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THE LAW OF PROMISSORY NOTES, DRAFTS, CHECKS, Etc.

BY

LESLIE J. TOMPKINS, M.S., LL.M.

PROFESSOR OF LAW, NEW YORK UNIVERSITY

PUBLISHED BY

BUSINESS PUBLISHING COMPANY

AMERICAN TRACT BUILDING

NEW YORK

1901

As stated in the introduction, an attempt has been made to place the general principles of the law governing bills and notes in the simplest and most direct English possible. In doing this, accuracy in statement of principle has been the controlling motive. I have to make special acknowledgment to Dean Clarence D. Ashley, of New York University Law School, for valuable aid and suggestion. The value of the cases and summary of the subject by Dean Ames, of Harvard Law School, is pre-eminent, and their aid is hereby acknowledged. L. J. T.

New York, 1900.

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THE LAW OF
PROMISSORY NOTES, CHECKS, DRAFTS, Etc.

INTRODUCTION

The law of negotiable securities, or, generally speaking, commercial paper, is a subject of the greatest importance to men engaged in business, standing, as it does, a monument to the practical skill and wisdom of the merchants of the world; to which has been added the prudence and learning of the world's greatest judges, by whose aid the mercantile usages have been turned into rules of law. In the discussion of it, we shall deal with transactions which are daily and hourly being carried on in the business offices of the land. The nature, character, and method of these transactions have been determined by law, and no departure from the substantial compliance of that law is permitted.

The object of the writer is to place, in as simple a manner as possible, before business men, an exposition of the law in such a way that they may more clearly understand the principles upon which their daily conduct

rests, and without which the trade and commerce of the world could not have reached its present supremacy.

In doing this, no originality of thought can be claimed for the work; and space will permit no more than a general acknowledgment to all the authors whose treatises on the subject have helped to elucidate and make clear the way.

In general the subject will be treated in its logical order, beginning with the inception of the instrument, and following it throughout its progress into the hands of third parties, back into the hands of the maker, and its final extinguishment by payment. As an introduction to each division of the subject, we shall place that section of the New York negotiable instruments law, which may be applicable, designating it as (Sec. —), and following it with so much of explanation and illustration as may be necessary to simplify the subject. Illustrations will be freely used from the leading cases on the subject—cases which are the foundation stones of the law as it stands to-day.

The work is primarily an exposition of the law concerning the instruments which are in daily use by the average mercantile house, viz.: promissory notes, drafts, and checks. In the treatment of foreign bills of exchange, there is much that is technical and of no great importance to the average business man; but no treatise on the subject, however small or

simple, can well ignore the subject; and they will be treated of in their logical order. Sections which belong ***exclusively*** to this subject will be prefixed by an asterisk (*), which may act as a labor-saver to those who are not interested.

CUSTOM OF MERCHANTS AND THE COMMON LAW

We shall use the term "common law" as meaning the law of England—that "domestic product" which has developed through many centuries, and which stands to-day in all its strength and glory. It is called "common" because it is common to the whole country, and is more frequently used in contradistinction to "statute law," or the express and positive will of the Legislature.

"Properly speaking," says Bigelow (Bills and Notes, p. 2), "the law of negotiable instruments is no part of the common law, but is derived from the ***custom of merchants.*** During the later part of the Hanseatic League, the commercial towns and cities of England were full of foreign merchants engaged in trade. These merchants brought with them the usages of business on the Continent, whence they had come. . . . What these foreign merchants brought to England in the way of peculiar usage was ***negotiability*** and ***grace—i.e.,*** the property of circulation, and a short extension of time in ease [accommodation] of the payer."

Aside from these two elements, and the element of ***consideration*** (which will be treated

of in its proper place), the law of negotiable instruments in its development to the present day has followed the ordinary course of the English law.

This custom of merchants, with its judicial and statutory additions, has become the *law merchant;* and, as such, refers to and means the law of bills, notes, and checks.

The Negotiable Instruments Law

Previous to October 1, 1897, the law governing negotiable instruments in the United States was practically the law merchant, except as it had been changed by *statute*. A vast number of decisions from the courts of England and of the United States have fortified it, but in many points the law of England differed from that of the United States, and there was much confusion due to differences between the law as interpreted and enforced in the different States. The law in England was codified into the *English Bills of Exchange Act*, which went into effect August 18, 1882.

For some years, uniformity of laws has been the cry throughout the United States, and the cry has been heard first in the matter of negotiable instruments. The new law, codified from the common law and the statutes of the States by the commissioners, and largely modeled on the English Bills of Exchange Act, went into effect in New York October 1, 1897, and in that year was adopted by three other States. It has since been adopted in twelve others, making sixteen in all, viz.: Connecticut, Colorado, Florida, Virginia, Maryland, Massachusetts, Washington, Oregon, North Carolina, Utah, Tennessee, Wisconsin, North Dakota, Rhode Island, and the District of Colum-

bia. The drafts of the law as enacted in these various States do not differ materially from each other, except in that section numbers may be changed, and section headings introduced, and perhaps some special matters added which are singular to that State.

There have been very few decisions touching the law in New York during the past three years. It is not too much to say that the next few years will see important decisions on the subject, for there are many important changes which must yet receive judicial interpretation before we can be satisfied that the changes are permanent and for the better.

It may be well to state that instruments made before May 19, 1897, when the law was passed in New York, and which have not yet matured, are governed by the old rules of law which obtained previous to that date.

Negotiability

Negotiability is the property by which an instrument, or undertaking to pay, is transferred from one person to another in such manner as to constitute the transferee the holder thereof (Sec. 60). In other words, negotiability causes these instruments to pass from hand to hand like money.

A *negotiable instrument* is one the ownership of which is acquired by every person who takes it in good faith and for value, provided the instrument is such that the true owner could transfer the undertaking therein contained by the simple delivery of the instrument. Properly speaking, a negotiable instrument should pass by delivery only. Custom, as well as statute, has added to this, and said that instruments payable to order, and which therefore require indorsement, are negotiable. While negotiability is a question of law, and for the court to decide, it can be definitely stated that if any other act than delivery, or indorsement and delivery, is required on the part of the true owner, it is not a negotiable instrument. A good illustration of the above may be found in the English case of the London and County Banking Company *vs.* the London and River Plate Bank (reported in *L. R. 20, Q. B. Div. 232*), the facts of which

are as follows: For some years prior to 1886, Pennsylvania Railroad certificates of stock, when signed in blank, were dealt in by English bankers on the Stock Exchange as negotiable instruments. On examining the instruments, it was found by the terms appearing on their face that the property in them could only pass by transfer on the books of the company, and not by simple delivery. Notwithstanding the usage of the Stock Exchange, the court held them *not* negotiable. In other words, the property in them could not pass by simple delivery. Whether a man takes the instrument ***bona fide*** and for value is a question of fact for the jury to decide.

It is to be noted that the same law holds good in this country: certificates of stock are regarded as quasi-negotiable, *i.e.*—capable of being negotiated when signed in blank; but the moment the transferee's name is filled in, they become non-negotiable, and can be transferred only upon the books of the company.

INSTRUMENTS WHICH ARE NEGOTIABLE

In the United States the following instruments, when payable *to bearer* or *to order*, are negotiable:

(a) Promissory notes.
(b) Bills of exchange or drafts.
(c) Bank checks and certificates of deposit.
(d) Bonds generally.

The following are quasi-negotiable:

(a) Warehouse receipts.
(b) Certificates of shares.

Note that the words *to bearer* or *to order* are necessary to make any of the above-named instruments negotiable. The omission of either one or the other, depending upon the instrument (whether it be a bearer instrument or an order instrument), would make it non-negotiable, though a non-negotiable instrument may be made negotiable by the addition of either of these phrases—but the phrase must be added by the right party. For instance, in the promissory note—"Thirty days after date, I promise to pay to John Andrews Fifty Dollars," and signed "James Brown." Here Brown contracts to pay Andrews and no other. Brown himself might make the instrument a negotiable one by the addition of the words "or bearer" or "or order"; but it is doubtful whether Andrews could do this by adding either of the phrases at the time of his indorsement. There has been some division among the courts on the subject, and the wisest course is to treat it as a non-negotiable instrument.

DEFINITIONS

Promissory note. (Sec. 320.) A negotiable promissory note . . . is an unconditional *promise in writing* made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time (*i.e.*, a time accurately found out) a sum certain in money (*i.e.*, a definite

amount), to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

ILLUSTRATION 1

Boston, Mass., August 1, 1900.

Sixty days after date, I promise to pay to William Smith or order (or bearer), One Hundred Dollars. Value received.

JOHN TURNBULL.

Maker. The person who executes or signs the note. In illustration, John Turnbull.

Payee. The person to whom the instrument is made payable. In the illustration, William Smith.

Bill of exchange. (Sec. 210.) A bill of exchange is an unconditional *order in writing* addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money, to order or to bearer.

ILLUSTRATION 2

New York, N. Y., August 1, 1900.

Thirty days after date, pay to Horace Jones or order (or bearer), One Hundred Dollars. Value received.

JOHN HART.

To James Robinson,
32 Waverly place, New York City.

Drawer. One who executes or signs the bill

of exchange. In Illustration 2, John Hart.

Drawee. The person who is directed to pay the amount of the bill. In this case, James Robinson.

Acceptor. James Robinson, after he has seen the bill, and signified his intention of paying it by writing the word "accepted" and his name across the face of the bill.

Draft. Either a bill of exchange or a check.

Check. (Sec. 321.) A check is a *bill of exchange* drawn on a bank, payable on demand.

ILLUSTRATION 3

New York, N. Y., August 1, 1900.
Corn Exchange National Bank.
*Pay to the order of James Oliver*_____
*Seventy-five*_____*Dollars.*
$75. *WILLIAM WHITE.*

Note the fact that, except in form, Illustration 3 does not differ from Illustration 2. In the bill of exchange, or draft (Illustration 2), an individual is directed to pay the amount named; while in the check, the bank is directed to pay. With this variation, there is no difference between a check and a *bill of exchange on demand;* and the rules which apply to one apply to the other, with a very few exceptions.

Indorser. When the payee or any other person to whom he passes the instrument puts his name upon the instrument, he becomes by that act an indorser. The act itself is called *indorsement.*

Holder. The person who has the instrument legally in his possession. He may or may not be the true owner.

Indorsee. When the holder has placed his indorsement on the instrument, and passed it to a third party, that party becomes the *indorsee.* Note that he becomes also a *holder.* The terms are practically synonymous.

Foreign. Drafts and checks are "foreign" when drawn in one State or country, and payable in another.

ILLUSTRATION 4

Jersey City, N. J., August 1, 1900.

On demand pay to the order of Charles Abel Five Hundred Dollars.

GEORGE KING.

To Morton, Bliss & Co.,
55 Liberty street, New York City.

Here the validity of the draft must depend upon the law of New Jersey. Presentment, protest, and notice are regulated by the law of the place where the draft is payable, *i. e.*—New York in this case.

Inland. All drafts and checks payable in the same State in which they are drawn are *inland,* or domestic.

Bona fide. Means honestly, in good faith.

Value. Means valuable consideration, as distinguished from *good* consideration, which may be love and affection.

ILLUSTRATION 5

New York, N. Y., August 1, 1900.

Thirty days after date, pay to the order of Thomas Brown——— Four Hundred Dollars.

JAMES ROBINSON.

To Francis Bedlow,
47 Beaver street, New York City.

Indorsed on back:

Thomas Brown,
George Miller.

In Illustration 5, note that Robinson is the *drawer* (if it were a promissory note he would be called the *maker*); Brown is the *payee;* Bedlow is the *drawee,* also the *acceptor;* and Brown and Miller are *indorsers.* If they passed the instrument to you, you would be the *indorsee* or *holder.*

The distinction between the *drawer* of a bill of exchange and the *maker* of a promissory note is made because the contract of the one differs from that entered into by the other. The two are frequently confused, and the importance of the distinction does not become apparent until dispute arises upon the instrument.

We have now named all of the parties to negotiable instruments. The engagement, or understanding, which each enters into by being connected with the instrument, differs in some respects from that of each of the others. The rights and liabilities of each will be considered in their proper order.

PART II

Form and Essential Characteristics

(Sec. 20.) An instrument to be negotiable must conform to the following requirements:

1. It must be in writing, and signed by the maker or drawer;

2. Must contain an unconditional promise or order to pay a sum certain in money;

3. Must be payable on demand, or at a fixed or determinable future time;

4. Must be payable to order or to bearer; and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

For illustrations of a simple form of a promissory note, bill of exchange, or draft, and check, see illustrations 1, 2, and 3, pages 10, 11.

Writing. The custom of merchants demanded all negotiable instruments to be in writing. You can make an oral contract, it is true; but no oral promise or order would be regarded as a note, bill, or check. The statute now says, *in writing;* and it must be followed. But no particular writing material, nor any particular material for receiving the writing, is necessary. You may use a pencil, as well as ink, and it may be printed if desired. Any ma-

terial strong enough to hold the writing will answer—paper, slate, bark, or anything else.

Signature. Of course the instrument must be signed in some way in order to make it valid. Any mark will be sufficient so long as it expresses the intention of the drawer or maker to execute the particular instrument, or undertaking. There are several instances in the cases where the signature has been a simple mark, ciphers, figures, etc. If a mark or other device is used in signing, however, the holder has to show that what the party did write was intended to answer the purpose of the signature. There *must* be a signature of some kind. One or two cases of a draft or bills of exchange have occurred where the instruments were not signed by the maker. The drawee, knowing the writing, accepted them; and when actions were brought, the instruments were held to be promissory notes, the drawee having *impliedly* agreed or promised to pay the amount at the proper time. For instance:

New York, August 1, 1900.
Pay to the order of George Smith
Four Hundred Dollars——————
To Wm. Kenney, (*Unsigned.*)
Tarrytown, N. Y.

Kenney accepted this by writing his name across the face of the instrument, and he was held to be the maker of a promissory note.

Trade or assumed name. No person is liable

on the instrument whose signature does not appear upon it. (Sec. 37.) But one who signs in a trade or assumed name will be liable to the same extent as if he signed his own name. So long as *there is* intention to sign, any substitute may be used, and it will bind the party so signing.

Agency. Any person may sign as a duly authorized agent (Sec. 38), but due care should be taken to make known the agency. The safest way to sign is to write the name of the principal—be it individual or corporation—and then sign as agent or officer. For example:

The Mercum Trading Co.,
per Wm. Long, Treasurer. *Or,*
George Holdsworth,
by Wm. Adams, Agent (or attorney).

Do not fail to bring in the name of the principal in such a way as to bind him; because, if one were simply to sign his name, and add "agent" or "treasurer" to it, he would be personally bound. The courts have said that such a form of signature merely describes his position and identifies him. For example: "One year from date, we promise to pay to A. or order $1,000.00, value received. A. B., C. D., Trustees of First Parish." A. B. and C. D. were personally held because it does not appear that the instrument was executed in their office or character as agents. (Sec. 39.)

"*Per procuration.*" This term is seldom used in this country. It has a technical meaning, being an express intimation of a special and lim-

ited authority. A person taking an instrument so signed is bound to inquire into the extent of the authority of the person signing. So "a signature by 'procuration' operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority." (Sec. 40.)

Forged signature. Where a signature is forged or made without authority of the person whose signature it purports to be, it is *wholly inoperative.* (Sec. 42.) The reason, of course, is, that one can not be allowed to countenance a crime. There have been instances where transactions contrary to good faith have been allowed when *individual interests* only were affected; but where the fraud amounts to a crime, public morality will not allow it to be enforced. The language used, "wholly inoperative," is the language of the statute. It must not be taken too broadly. If an instrument, say a promissory note—the name of the maker being forged—comes into possession of B., the payee, who transfers it to C., C. can recover from B., because B. has, by indorsing and transferring the instrument, warranted the genuineness of the signatures. B., however, could not recover from the maker.

So, suppose B. is the drawee of a draft, and accepts it for C., the payee, who transfers it to D. The drawer's name is forged. B. pays the amount of the draft to D., and then finds out the forgery, and tries to recover the money

paid. He can not do it. Even if B. had not paid the draft, but had accepted it, either C. or D., or any other holder for value without notice, could recover the amount in an action on the instrument. The same reason applies here. B., by his acceptance, warrants the signature of the drawer, also promises to pay the instrument when due.

Negligence. So, too, of negligence. Suppose you have your bankbook balanced, and when it is returned to you, you lay it one side for a week or so. You then examine the vouchers, or canceled checks, and find that one or two have been forged. You are helpless because, by your negligence, you have precluded, or *estopped,* yourself from the right to set up forgery. This seems harsh, but it is the law in some States, and you must pay the penalty of carelessness. It is not the law in New York, however.

A promissory note must contain a promise. The general rule is, that the promise must be *express,* but this is not saying that the word "promise" must be used. Any equivalent may be used, but it is not easy to say what is an equivalent. It has been held that "Due A. B. *on demand*" is an equivalent; also "Due B. *or bearer*"; so "Received of A. B. $50.00, for which *I have to be accountable,*" are all promissory notes—the italicized words being deemed the equivalent of a promise to pay. "I. O. U. $50.00;" "Due X. & Y. $15.00;" "I. O. U. $20.00 for value received," are not promissory

notes, there being no promise to pay in any of them; and they are regarded as mere evidences of indebtedness.

**A bill of exchange or draft must contain an order.* The same rule applies here. The word "order" need not be expressly written so long as any words which amount to an order are used. Here, again, we have difficulty in finding what is and what is not an equivalent. Words of politeness do not invalidate, however. For example: "Please let bearer have $50.00; I will arrange it with you this noon"; "Mr. A. will oblige Mr. B. by paying C. or order $100.00," are good bills; while "Please let bearer have $20.00, and place it to my account, and you will much oblige me"; "We hereby authorize you to pay on our account to the order of B. $5,000.00," are not deemed drafts, for want of an order or the equivalent."

The order or promise must be unconditional. The order or promise to pay must be unqualified and unconditional. In other words, nothing can be added which will in any wise prevent the payment of the instrument at the time stated, or affect the amount named from being paid. An *order to pay* out of a particular fund would be conditional, because there might not be enough in the fund to meet the instrument. So, none of the following would be good instruments:

"I promise to pay C. or order $100.00 out of the money in my hands belonging to A." "Pay C. or order $100.00 on the sale of the Y.

hotel." "I promise to pay C. or order $100.00 out of my share of the partnership profits." "Pay C. or order $100.00, the demand I have against the estate of X., deceased."

But if the order or promise is absolute, and there be coupled to it (1) a *direction,* or *indication* of a particular fund out of which reimbursement is to be made, or a particular account be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument—the instrument is valid. Note that the *direction,* or *statement,* or *indication* may be regarded as surplusage, because the instrument must be paid, and it matters not to the holder where the money comes from. So long, then, as it is sure that it will be paid, the attaching of statements like those above named does not matter. The following instruments are valid: "Pay C. or order $100.00 against cotton, per 'Swallow';" "I promise to pay C. or order $100.00 on account of moneys advanced by me for the A. Company;" "Pay C. or order $100.00, and take the same out of my share of the grain." The *test* is, whether the drawee or maker is confined to the particular fund; or whether, though a specified fund is mentioned, he could have the power to charge the instrument up to the general account of the drawer or maker, if the specified funds turns out to be insufficient. (Sec. 22.)

Under (2) it is said that the promise to pay is absolute and unconditional, even though it be coupled with a statement of the transaction

which gave rise to the instrument. This is the language of the Act, and it is submitted that it is so indefinite in its meaning as to be dangerous in its application.

The instrument must be an order or promise for a payment in money. In the language of the statute, it must be for a "sum certain *in money.*" (a) *Money.* The instrument must be for the payment of money, because it is to have a commercial character and circulate as cash. Strictly speaking, " money " is that commodity which the law has said is tenderable for debt. The question of what is meant by " money " was of more importance in this country some years ago, when we had every kind of banks issuing bills. We still have various bank bills, but they are now generally issued only by national banks; and, as such, the courts have judicially recognized them as the equivalent of money. What is more important, perhaps, to the business man, is to say that money does not mean goods, or bonds, or property, or work, or labor. So, " I promise to pay C. or order in printing "; " Pay C. or order in money or labor at your option "; " I promise to pay C. or order $1,000.00 ' in good East India bonds, ' " are none of them valid instruments, not being payable in *money* or its equivalent. So, too, you can not make a note or draft in the United States payable in the United States in Canada money. But if the note or draft is made in the United States, and payable in Canada in Canada money, it would

be valid. The reason is, that Canada money is not recognized as money by our law, *i.e.*, it is not tenderable for debts in the United States. You may, however, draw a draft in New York payable in New York for francs or pounds sterling or marks, or by any other name used in foreign countries. For instance: "Pay C. or order £500," executed and payable in New York, is good, though you can not get the £500; but you will get its equivalent in United States money at the current rate of exchange. When we say you will not get the instrument paid in English money, we mean that you can not enforce payment in that way. In New York or any other large city in the United States, it would not be difficult to secure the English money. The law may designate a particular kind of current money, and, if it does, an instrument payable in such current money is good. For instance: "Pay C. or order $500.00 in United States gold coin of the present standard of weight and fineness" is good. So, too, "Pay C. or order in bank bills current in the city of New York" is good. But "I promise to pay C. or order $100.00 in Tennessee money" is not good, because there is no such thing as "Tennessee money." Of course, if the law of some particular State says that an instrument payable in goods or merchandise is negotiable, it is negotiable in that State; but not in States having no such law. Iowa has such a law.

(b) A note or draft may be made for any sum.

(c) The sum for which a bill or note is drawn must be expressed. If there are any words or figures by which the amount may be ascertained, the instrument will be declared valid. For instance: "Pay C. or order $——" is not valid; and courts would not allow any oral evidence to show that any particular sum was meant. So, "I promise to pay C. or order Twenty ———" is not valid, for the amount is not expressed. It may mean dollars, or cents, or tons of iron. The following have been held good, however: "I promise to pay C. or order fifty-two 25-100"—a Missouri case; and so in England, "Pay to my order twenty-five, ten shillings," was held good as a draft for £25 10s. These were cases where no figures were placed in the margin. Where the sum is expressed in words as well as figures in the margin, and there is any discrepancy between the two, the words will prevail. If, however, there is an omission in the words, and the figures are placed in the margin, the figures may supply any omission in the words. (Sec. 36.)

Blanks. It is important to remember that if one were to sign a note, and omit to put in the name of the payee, then any person who receives it is authorized to fill in his name or any other name he sees fit. More important, however, is this: if you fill in the name of the payee, and sign the instrument, and leave the

amount blank, and then *deliver* the instrument into the hands of the payee, you thereby authorize him to fill it up for any amount. Of course, if there is any agreement or intention that can be shown between you and the payee, the payee can not enforce the instrument against you contrary to the agreement. But if the payee fills up the blank contrary to the agreement or intention, and then passes it over to an innocent holder for value, the holder may enforce it against you. The reason for this is, that where one of two innocent parties must suffer by the fraud or wrong of a third person, the one who put it in the power of such third person to commit such fraud or wrong must bear the loss. (Sec. 33.)

Delivery. Note that the statement was made that the above is true when the incomplete instrument had been *delivered.* If the instrument was incomplete and *had not been delivered,* and without authority a third person should fill it up and negotiate it, it can not be enforced against the original party. In other words, a negotiable instrument must be complete and perfect when it is issued, or there must be authority reposed in someone afterward to supply anything needed to make it perfect. Mere negligence will not make a person liable on an instrument. An interesting and leading case on this subject is that of Baxendale *vs.* Bennett reported in *L. R. 3, Q. B. Div. 525.* In that case, A. gave an instrument signed in blank to B., who afterward returned it to A.

A. placed it on his desk. While absent from the room, C. stole it, and filled in his own name and the amount. C. then negotiated it, and a *bona fide* holder tried to force A. to pay it. The courts said that, while A. was negligent, he had not voluntarily put it in the way of C. to commit a crime; therefore, A. was not held liable.

It is not always easy to say just what is or is not a sufficient delivery. Usually possession of the instrument is evidence of title. This may be rebutted, however, by the proper evidence. If the instrument is in the hands of a *bona fide* purchaser for value, delivery is presumed to have been made properly. As between immediate parties, *i.e.*, the maker or drawer or the drawee and the payee, the payee and indorser, etc., delivery must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be. In such a case, the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. (Sec. 35.) For instance, if you borrow $500.00 from A., and deliver to him a promissory note for that amount as collateral security, with the understanding that he is not to negotiate the note until you have failed to meet the payment of the $500.00, and A. negotiates the note before such time, you can show the delivery to have been conditional, in an action brought by A. against you to recover on the note. But if

A. has negotiated the note to B. or C., and either brings an action against you, and shows he is a *bona fide* holder for value without notice, you can not show conditional delivery, because, in such a case (*i.e.*, between remote parties), valid delivery is "*conclusively presumed.*" In other words, it is taken for granted that the delivery was valid, and that all transactions were properly carried out. This is again the language of the statute. The cases do not hold this true, nor does the writer believe it to be good law. "Conclusively" is too strong a word. It is presumed, *i.e.*, taken for granted, that the delivery is valid until the opposite be shown, is the better and more correct statement.

(d) The order or promise to pay *must not be coupled with an independent* order or promise to do something else. The best reason for this is, that if the instrument contains both a promise or order to pay money, also a promise or order to do something else—as to deliver up ten horses—it contains two contracts, which are governed by different rules of law—one by the law merchant, the other by the common law. So, "Pay C. or order $100.00, and deliver up to him the house"; or, "Pay C. or order $100.00, and take up my note for that amount," are not good instruments. But certain provisions which are *not independent promises* or *orders* to do something else may be attached without affecting the validity of the instrument. So, a provision attached to a note or draft

which authorizes the sale of collateral securities, in case the instrument is not paid at maturity, is good. The provision must merely authorize the sale of the collateral in case the note is dishonored, and nothing else.

FORM OF TIME NOTE WITH COLLATERAL

$750.

New York, N. Y., August 31, 1900.

Six months after date for value received, I promise to pay to John Doe, or order, at the office of the Corn Exchange Bank, Seven Hundred and Fifty———Dollars, with interest at the rate of 6 per cent. per annum, having deposited with said bank, as collateral security for the payment of this note, 50 shares Western Union Telegraph stock, with such additional collaterals as may, from time to time, be required by the said John Doe, and which I hereby promise to furnish on demand. If these required collaterals be not so given, then this note shall become due and payable with rebate of interest. And I hereby give to said John Doe full power, at his option, to sell, assign, and deliver the whole or any part of said collaterals, or any substitutes therefor, or additions thereto, at any broker's board, or elsewhere, at public or private sale, on the nonperformance of the above promises, or of any of them, or at any time thereafter, and without demand, notice, or advertisement, and on any such sale the said John Doe may purchase.

IT IS ALSO AGREED that said collaterals

may, from time to time, by mutual consent, be exchanged for others, which shall also be held by the said John Doe on the terms above set forth, and if I have or shall come under any other liability to said John Doe, the above securities may be applied on such other liabilities.

IT IS FURTHER AGREED that the undersigned does hereby authorize and empower the said John Doe, at his option, at any time, to appropriate and apply to the payment and extinguishment of any of the above-named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys, securities, or other property now or hereafter in the hands of the said John Doe, on deposit or otherwise to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due.

(*Signed*)

RICHARD ROE.

So, a provision which authorizes a confession of judgment, if the instrument be not paid at maturity, may be attached.

FORM OF NOTE AUTHORIZING CONFESSION OF JUDGMENT

$500. Scranton, Pa., August 31, 1900.

Four months after date, I promise to pay to the order of John Doe Five Hundred Dollars, at No. 213 Center street, for value received, without defalcation. And I do hereby confess judgment for the said sum, with interest, waiv-

ing the benefit of all laws exempting real or personal property from levy and sale, inquisition, and condemnation; and should an execution be issued, hereby agree that an attorney's commission for 5 per cent. shall be charged; and do hereby agree that this note may be entered of record against me, as herein provided.
RICHARD ROE.

It is to be remarked that judgment notes were not known in New York previous to the passage of the new law, and are not likely to become common.

So, a provision which waives the benefit of any law intended for the advantage or protection of the obliger may be attached, and the instrument still be valid. This rule was intended to cover cases which may arise in States where homestead and exemption acts exist. Such laws exist in this State, and the new law covers such cases, and makes such instruments valid. A good form is as follows:

$750.00. *New York, August 31, 1900.*
Sixty days after date, I promise to pay to the order of Wm. Sand, Seven Hundred and Fifty Dollars, without any stay of execution, without defalcation, and with this express waiver of any and all laws authorizing a stay of execution or exemption of property from levy or sale. *WM. ROBINSON.*

So, too, a provision which gives the holder an election to require something to be done in lieu of payment of money, may be attached and

the instrument be valid. Under the old rules many jurisdictions held this kind of an instrument to be invalid. It was, and is now, good in New York, and in all States where the new negotiable instruments law is in force. Such a case as the following will illustrate the point: "Four months after date, I promise to pay to the order of M. W. Wilson Fifty-five Dollars, at my store (or in goods on demand), value received." The court said in that case that the promise is for an unconditional payment of money. It is not optional with the maker to pay in money or stock, the election being in the power of the payee, who may enforce payment in money if he sees fit; or he may take goods.

(e) The sum payable must be a certain and definite sum. (Sec. 21.) In the language of the statute, it is to be a "sum certain." If it were not so, no definite action could attach to it. A leading case on this subject was that of Smith *vs.* Nightingale, reported in *2 Starkee, 375.* In that case, the instrument read as follows: "I promise to pay to James Eastling, my head carter, the sum of £65, with lawful interest for the same, three months after date, and also all other sums which may be due to him." The court said the instrument was too indefinite to be considered a promissory note: it contained a promise to pay interest for a sum not specified, and not otherwise ascertainable than by reference to the defendant's books. This case has settled the law on the subject. and an instrument in which the amount of

money payable is not determinable by inspection is not a note or draft.

None of the following are valid instruments: "Pay C. or order $50.00 or $60.00"; "I promise to pay C. or order $100.00, with interest the same as savings banks pay"; "I promise to pay C. or order $100.00 in two years, with interest, or without interest, if paid within one year." In no one of these illustrations is the amount payable determinable by inspection of the instrument. They all open the door to disputes between parties, and definite actions could not be based on any of them.

Interest. An instrument in which the sum payable is certain may carry interest with it, however, and come within the rule of law. (Sec. 21, Sub. 1.)

Installments. So, too, the sum payable may be paid in installments. It is always best to state this in the instrument, and to specify the time when each payment is due; and the law says one may further add to the instrument a provision that, upon default in payment of any installment or of interest, the whole shall become due. All of this does not make the amount payable uncertain, and, therefore, such instruments are perfectly good. (Sec. 21, Sub. 2.)

Exchange. Drafts are frequent in which will be found the words "with exchange on (name of city)," and they have long been used in this country. Many of the courts, including the United States Supreme Court, have held that instruments payable with current exchange are

not good. The Negotiable Instruments Act has made these instruments good. The trouble was, that current exchange was, and is, a fluctuating quantity, therefore uncertain. Now an instrument payable with exchange—whether at a fixed rate or at the current rate—is good, and can be enforced. (Sec. 21, Sub. 4.)

Where a bill is drawn in one country and payable in another, and the amount payable is expressed in the currency of the former, it must be calculated according to the rate of exchange on the day the instrument is payable. For instance: A., in London, draws a draft on B., in New York, for £100 sterling; the amount in dollars which the holder is entitled to receive is determined by the rate of exchange on the day the draft is payable.

Collection and attorney fees. The fact that there is coupled to the instrument words authorizing the collection of costs for collection or an attorney's fee in case the instrument is not paid at maturity, does not invalidate the instrument. The amount to be paid is certain while the instrument is negotiable, becoming uncertain only after it has been dishonored. There has been some division of opinion among the courts on this subject, but the Negotiable Instruments Act has decided the question in the affirmative; and in doing so, the framers followed the weight of authority in the matter. (Sec. 21, Sub. 5.)

Time of payment. A negotiable instrument must be definite as to time of payment. In the

language of the statute, it must be payable on demand or at a fixed or determinable future time. To be a little more definite, an instrument may be payable (1) on demand, (2) at sight, or (3) at a determinable future time. Since days of grace have been abolished, there is little or no distinction between the expressions "on demand" and "at sight." An instrument is payable on demand when it is expressed to be so payable; or at sight, or on presentation; or when no time for payment is expressed, it is so payable. Or, further, when an overdue instrument is issued or transferred, as regards the person so issuing or transferring it, it is payable on demand. (Sec. 26.) Familiar illustrations are: "On demand, I promise to pay"; "At sight, pay to C. or order"; "When demanded, I promise to pay"; "In such installments and at such times as C. (the payee) may require." Where the day, or the last day, for doing any act in accepting, or paying, or protesting, or giving notice of dishonor of a negotiable instrument falls on Sunday or on a holiday, the act may be done on the next succeeding secular, or business day. (Sec. 5.)

An instrument payable at a future time is within the meaning of the statute, which says "payable at a fixed or determinable future time," when it is expressed to be payable. (Sec. 23.)

(1) At a fixed future time: "January 1, 1905, I promise to pay C. or order $100.00";

(2) At a fixed period after date: "Sixty days after date, I promise, etc.";

(3) At a fixed period after sight: "Thirty days after sight, pay C. or order";

(4) At a time certain to transpire, though indefinite. No instrument is valid which is payable on a contingency. Such an instrument might be: "Pay C. or order $100.00 when I marry X."; or, "When the estate of X. is settled"; or, "Upon arrival of ship 'Swallow' at Calcutta"; or, "When X. arrives at age."

Some little discussion has arisen as to the principle of an instrument's being payable at a time certain to transpire, though indefinite—in the case of instruments payable after the death of the maker, or of any other person. The rule of law is settled, however, and such instruments are good if given for value. For instance: "Pay C. or order one year after my death"; "I promise to pay C. or order $100.00 two years after the death of my father."

If an instrument is made payable upon a contingency, the law has said that such an instrument is invalid; and the happening of the contingency will not make it valid. For instance: "I promise to pay C. or order $100.00 when X. shall arrive at age" is not a good note, because the time of payment is contingent upon X.'s arriving at the age of twenty-one, and he may never arrive at that age. If he does, it will not make the note good.

Date. A date in a note or draft is required only for the purpose of fixing the time of pay-

ment. If the time of payment is otherwise indicated, no date is necessary. When the instrument, or any acceptance or any indorsement thereon, is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance, or indorsement, as the case may be. (Sec. 30.) By *prima facie* is meant that it is presumed to be the proper date; but evidence may be introduced—as between immediate parties—to show a mistake was made. If the date is an impossible one, the law will adopt the one nearest to it; thus, February 29, 1900, would be deemed February 28.

So, when an instrument is not dated, it will be considered to be dated as of the time it was issued or first negotiated. (Sec. 36.) So, too, if the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument; and if the instrument is undated, from the time of its issue or first negotiation. (Sec. 36, Sub. 2.)

Where the instrument is expressly payable at a fixed time after date, and it is issued undated; or where the acceptance of a draft payable at a fixed period after sight is undated, then any holder may insert the *true* date of issue or acceptance, and the instrument is payable accordingly.

Ante-dated and post-dated. An instrument is not necessarily bad because it is dated ahead (post-date) or dated back (ante-dated) unless it is done with the intention of committing a

fraud, or for some other illegal purpose; and such instruments may be negotiated. In the case of an instrument dated ahead, it may be negotiated before the day of its date; and the holder acquires the title to it the day it is delivered to him. (Sec. 31.) In the case of Passmore *vs.* North, reported in *13 East, 517*, the payee negotiated a post-dated instrument, and died the day before the day of date. It was held the holder had derived title through such payee, and could recover of the drawer.

Parties. In Part 1, we have already defined the different parties. If you will read again the definitions of a note, and then a draft, you will get a clear idea of how many parties there must be to each. A note is an unconditional promise in writing *made by one person to another*, signed by the maker, etc. (Sec. 320.) You readily see that two parties are required to a note: first, the maker; second, the payee. But a note may be made payable to the maker's own order; in other words, the maker and the payee may be the same individual; but what is more important to note is the fact that, if the maker and the payee are the same individual, the note is not complete until it has been *indorsed*.

A *bill of exchange, or draft,* is an unconditional order in writing *addressed by one person to another,* signed by the person giving it, requesting the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money *to*

order or *bearer.* (Sec. 210.) Note here that, in point of form, there must be *three parties* to a draft, or bill. All of these parties must be certain.

Drawer or maker. We have already explained the position of the drawer of a draft or the maker of a note, under the title of Signature and we will only repeat that no instrument can be a valid one unless it be properly signed by the party who brings it into being. Remember, however, that if the party drawing a draft fails to sign it, and the drawee sees fit to accept it unsigned, knowing the circumstances and running the risk, the draft loses its value as a draft and it may become a promissory note. Of course, there may be more than one maker or drawer of a negotiable instrument. In such cases, all are treated as joint makers; and, according to the statute, are joint and severally liable—*i.e.*, if each does not pay his proportion, you can collect the whole amount from any one of them who is good.

Payee. The custom has long been established that an instrument may be made payable to a person named in the instrument, or to his order, or to bearer. When the instrument is made payable to a particular person simply—the words "or order" or "to bearer" being omitted—it is valid as between the parties; but it is not negotiable. Remember that the words "or order" or "to bearer" are required to make it negotiable. An instrument payable to the order of a particular person

means just what it says. In the instrument "I promise to pay C. or order," C. can enforce payment; and he need not indorse it in order to do so; or he can indorse it, and order it paid to D. or E.

In the language of the statute, an instrument is payable to order where it is drawn payable to the order of a specified person, or to him or to his order. (Sec. 27.) As such, it may be drawn payable to the order of a payee who is not the maker, drawer, or drawee, and who has no connection with any of them. "I promise to pay to C. or order $100.00," signed A.; or it may be made payable to the order of the drawer or maker, "Pay to myself (or C.) $100.00," signed C.; or, further, it may be made payable to the order of the drawee, as

New York.
Pay to the order of Wm. Jones $100.00.
To Wm. Jones,
40 Broad St. *JOHN ROE.*

Or, further, it may be made payable to the order of two or more payees jointly, as "Pay to C., and D., and E. $500.00." In this case, the amount would be equally divided among the three parties.

Further, according to the statute, you may make the instrument payable to the order of one or more of several payees, as "Pay to C., or D., or E., or any two of them, $100.00." On principle, such an instrument should be void,

because of confusion as to the "certainty of payees." Suppose there is a quarrel among the three, whom would you pay? But the statute seems to mean just what it says, and, inasmuch as it has received no judicial interpretation, its evident and general meaning seems to say that such an instrument is good It ought not to receive such interpretation, and the suggestion is made that you will avoid trouble by making your payee certain. At the same time, I am not unaware that checks are frequently drawn to the order of one party or another, and that they are seldom questioned by the banks. Again, an instrument may be drawn to the order of the holder of an office for the time being, as "Pay to order of A., B., and C., Trustees, *or their successor in office.*"

It is quite a frequent custom to draw instruments to the order of the cashier, or treasurer, or secretary, or president, or any other officer of a corporation. When this is done, it is equivalent to an order to pay to the order of the corporation; and if the corporation wishes to negotiate the instrument further, it may indorse by using its name and the name of any other officer authorized to sign the corporation's name. (Sec. 72.) For instance, a note payable to "Cashier, New York Life Assurance Society," may be indorsed by its president or treasurer, or any other officer than the cashier, if the person signing has authority to do so. The general rule in the matter of payee is, that he must be indicated with "reasonable cer-

tainty." This does not mean that he must be designated by *name*, though it is better to do so. If his identity can be ascertained with certainty, it is enough. Such a case is hardly likely to occur now, though there are a few cases in the books wherein the language has been sufficient to bring out the identity of the payee without his name being expressly written as payee.

If an instrument is blank as to the payee, it may be negotiated; and any rightful holder may make it complete by inserting his own name as payee. (Sec. 33.)

No confusion is likely to arise in the reader's mind as to the payee and maker of a promissory note being the same, for such notes are common enough; but for the sake of clearness, we wish to say again that, while on principle there ought to be three distinct parties to a draft, cases are frequent where the drawee and payee, or the drawer and payee, are the same; and, in some cases, all three parties are the same. In such a case, indorsement is necessary in order to negotiate it. For instance:

New York, August 31, 1900.
Pay to the order of ourselves $500.00.
To Morgan & Company,
St. Louis, Mo. *MORGAN & CO.*

In such a case, one branch of the same house is drawing on another branch, which is frequently done.

So much for an instrument payable to order.

We now come to bearer instruments; and an instrument is payable to bearer (see Sec. 28) when it is so expressed, as "Pay to bearer $100.00"; or when it is payable to a person named therein *or* bearer, as "Pay to Wm. Smith or bearer $100.00"; or when it is payable to a fictitious or non-existing person, and such fact was known to the person making it so payable, as "Pay to Jane Doe or order $100.00." Note that the person making the instrument ***must know*** and ***intend*** to make it payable to a fictitious person, otherwise it will not be regarded as a bearer instrument, and no person can acquire title to it by simple delivery.

In the case of a fictitious payee the custom among merchants is to require an indorsement in the name of the fictitious payee before it can be treated as a bearer instrument.

Again, if the name or word inserted does not purport to be the name of a person, it is treated as an instrument payable to bearer. Instruments payable to "Cash," or "Sundries," or "Bills Payable," or "Bills Receivable" are all bearer instruments. Lastly, when the only or last indorsement is a blank indorsement, *i.e.* simply the signature of the payee or indorser, and nothing else, it then becomes a bearer instrument, and needs no further indorsements.

Drawees. The drawee must be certain, *i.e.*, so named that you can tell with reasonable certainty who he is. It is usual to place the word "To" before the name of the drawee, and to

follow the name with his address, as " To John Doe, Utica, N. Y." If not so named, he must be so named that he can be identified. The cases are not clear as to what would be proper identification; for instance, the following drafts have been held to be proper drafts:

> *New York, May 20, 1813.*
> *Pay C. or order $500.00.*
> *W. SUSTENANCE.*
> *Payable at No. 1 Broad St.,*
> *New York City.*

> *New York, October 21, 1804.*
> *Pay C. or order $300.00.*
> *THOS. STEPHENS.*
> *At Messrs. Morgan & Co.*

In each case, the word *at* was taken to mean *to.* It is a wide stretch of the imagination to construe the address in the first case as a drawee, but such was the case.

Of course, there may be two or more drawees named; and in such a case, they are jointly liable after acceptance; but you can not draw on two or more in the alternative. (Sec. 90.)

> *New York, August 31, 1900.*
> *Pay C. or order $100.00.*
> *To Wm. Smith, and*
> *Richard Roe, and*
> *John Brown.* *JOHN DOE.*

is a good instrument, but the following example

New York, August 31, 1900.
Pay C. or order $100.00.
To Wm. Smith, or
Richard Roe, or
John Brown. *JOHN DOE.*

is not good. The reason is, that each might say that the other must pay, and confusion arises. For exactly the same reason there should be no alternative allowed in naming the payees. Statutes are not always consistent.

When a draft may be treated as a promissory note. Where the drawer and drawee are the same person, or where the drawee is a fictitious person, or is a person not having capacity to contract, *i.e.*, an infant, lunatic, etc., the holder may treat the instrument, at his option, either as a draft or a promissory note. (Sec. 214.) So, too, where the instrument is so worded that you are in doubt whether it is a draft or note, you may treat it as either, at your option. (Sec. 36, Sub. 5.) This is of little value to the business man. Its importance would only be shown when an action was brought on the instrument.

Value received. These words amount to nothing in either a note or a draft. (Sec. 25, Sub. 2.)

Seal. The validity of a negotiable instrument is not affected, whether it bears a seal or not.

Corporations usually affix their seal, but it is not necessary. (Sec. 25, Sub. 4.)

Place. It is not necessarily fatal to neglect to specify the place where the instrument is drawn, or the place where it is payable. It is always better to add both—the later especially—when payable in large cities; but both may be omitted, and the instrument still be good. (Sec. 25, Sub. 3.)

Immediate and remote parties. To understand more clearly what is to follow, the distinction between immediate and remote parties should be borne in mind. Immediate parties are those who participate in a single transaction. For instance, a note may be negotiated several times, *i.e.,* A. gives it to B., B. gives it to C., C. gives it to D., and so on. Each negotiation is a single transaction, and the parties immediately interested, as A. and B., B. and C., C. and D., are immediate parties; while those who participate in different transactions are remote parties, as A. and C., B. and D., etc. So, the maker and payee of a note, the drawer and acceptor (drawee) of a draft, the drawer and payee, the indorser and his immediate indorsee, are all immediate parties; while the indorsee and maker of a note, or the indorsee and one who is not his immediate indorser, are remote parties. The rights of immediate and remote parties differ, as we shall see; and their distinction is important.

PART III

CONSIDERATION; INDORSEMENT

Consideration. Consideration is peculiarly a common law doctrine. Under this law, a promise made without consideration is invalid, it being necessary to aver and prove consideration in order to establish any contract. This theory of consideration was unknown to the merchants, who brought from the continent the customs of negotiability and grace. With them the possession of the instrument was conclusive, and no consideration was necessary. The English courts did not agree with this, preferring their own common law theory above stated. Finally the English law gave way in part to usage and custom, and the law became settled that bills of exchange and promissory notes are regarded *prima facie* as given for consideration. In the language of the statute: Every negotiable instrument is deemed *prima facie* to have been issued for a valid consideration. (Sec. 50.) In other words, the burden of proving lack of consideration is on the person obligated. It is sufficient for the holder in the first instance to prove the paper—*i.e.*, simply put the instrument in evidence; and this will be sufficient unless the defendant denies consideration; and if he does, he (the defendant)

must then go forward with his evidence *to establish* the absence of consideration. This having been done, the plaintiff (payee or holder) must then proceed to rebut this by putting in evidence that he parted with consideration for the instrument.

Consideration defined. Consideration is something furnished to the promisor in exchange for his promise. It is that which the promisor has asked in exchange for his promise. In the law of negotiable instruments, any consideration sufficient to support a simple contract is valid. (Sec. 51.)

A valid consideration is necessary to support any contract, and the rule applies with equal force in the law of negotiable instruments, when the question of consideration is open to inquiry. But consideration does not necessarily mean money paid. Advances made, credit given, work and labor done, dismissal of any suit pending, release of right of dower, a compromise of a supposed cause of action, marriage, and promise to marry, professional and other services rendered, the "good-will" of a business, a promise to the promisor in exchange for his promise—all these and many other things constitute valid consideration. "In short, consideration is something furnished to the promisor in exchange for his promise. It must be something which the law can recognize as having some value, however slight; and may be something actually given to the promisor, or it

may be the doing or the refraining from doing something by the promisee."—Ashley on Contracts, p. 69.

Negotiable instruments presume a consideration. As stated above, drafts or bills of exchange and promissory notes which are regular in form, carry with them presumption of consideration; and in the first instance, it is unnecessary for the plaintiff (the payee or holder) either to aver (formally assert) or prove a consideration. Yet when evidence has been introduced by the defendant (be he drawer, maker, indorser, or acceptor) denying the presumption, the plaintiff must give evidence that he gave consideration. And this is true, even though the words "value received" be included in the instrument. The words "value received" are generally expressed in a note, but they are not essential to either a note or bill. (Sec. 25, Sub. 2.) In a note, they tend to show value received by the maker from the payee; in a bill, they are somewhat ambiguous, as they may mean either value received by the acceptor from the drawer, or by the drawer from the payee. According to the best authorities, these words have no effect.

Instruments in hands of third parties. When the instrument passes into the hands of a third party, the defendant (provided he is not the immediate indorser) must show not only lack of the original consideration, but he must also show lack of consideration between the

plaintiff and his immediate indorser. Generally speaking, as between the third person and the defendant, the burden of proof is upon the defendant, and he must show that the third party did not give consideration for the instrument. For instance: A. is a maker of a note, B. the payee; B. transfers the note to C., and C. to D.; D. brings an action against A., and merely sets forth the instrument, consideration being presumed. A. must not only show that no consideration passed from B. to him, but he must show also that no consideration passed from D. to C.

Parties between whom consideration can be questioned. The general rule is, that between the immediate parties to any contract of drawing, accepting, making, or indorsing a negotiable instrument, it may be shown that there was no consideration; while as between parties *remote* to each other, this can not be done. It becomes important, therefore, to remember who are immediate parties (or parties between whom there is a privity), and who are remote parties.

Immediate parties. (1) Drawer and payee of a draft, (2) maker and payee of a note, (3) indorser and his immediate indorsee of either a note or draft. In an action on a negotiable instrument by anyone of the parties in either class against the other, lack or failure of consideration may always be set up. For instance, in an action by B. the payee against A. the drawer; or by B. the payee against

A. the maker of a note; or by C. the holder against B. the payee, etc., each party sued may set up lack of consideration as against the party bringing the action. The drawer and acceptor have been held immediate parties so far as the acceptor's being able to show as against the drawer that he accepted for too much.

Remote parties.

(1) Indorsee (or holder) and maker of a note, as D. and A. respectively in the following instrument: A. the maker, B. the payee and indorser, C. an indorser, and D. the indorsee, or holder.

(2) Indorsee (or holder) and a prior (not the immediate) indorser, as B. and D. in the above illustration (note that C. is D.'s immediate indorser).

(3) In most cases, the indorsee, or holder, and acceptor of a draft, as A. drawer, B. drawee (acceptor), C. payee and indorser, D. an indorser, and E. indorsee and holder —E. and B. are remote parties.

(4) In most cases, the payee and acceptor, as C. and B. in the above illustration.

As between these parties, two things must be inquired into, and both proved: (1) The consideration which the defendant (the acceptor) received for his liability, and (2) that which the plaintiff (the payee or indorsee) gave for his title. If the payee or the indorsee or any intermediate holder gave consideration for the instrument, the plaintiff's title is sus-

tained, and the acceptor must pay the instrument.

Want of consideration can not be pleaded in an action brought between the parties mentioned in the first two classes; and, generally speaking, this is true in the third and fourth. It is not always easy to determine the position of parties to an instrument, as when the payee's name is left blank, or there is a blank indorsement upon the instrument. In such cases, the holder may show his position as a party. Other positions exist, but they are too technical for general understanding, and the best rule to follow in such cases is to consult an attorney for advice and action.

Laws which govern. The laws in force at the time an instrument is given determine its legality and effect. For instance, A. gives a note to B. in exchange for a barrel of whisky, with immediate delivery. Before the note matures, the State passes a prohibitory liquor law, which would make an instrument given for such a consideration invalid. But the instrument was made before the law was passed, and will be governed by the laws in force at the time it was made, and is therefore good.

Indorsement

Indorsement is the writing of the name of the indorser on the instrument with the intent on his part either to transfer, or pass the title to the instrument; or to add strength to the security of the holder by assuming a contingent liability for its future payment. This latter is called accommodation indorsement.

Indorsement is not only a contract, but it is in addition a transfer. Treated as a contract it is subject to all the rules of contract. As a transfer it is within the law merchant and governed by its rules.

Where written. The indorsement must be written on the instrument itself, or upon a paper attached to it; and the signature of the indorser, without additional words, is a sufficient indorsement. (Sec. 61.) The usual place for an indorsement is on the back of the instrument, but it must be *somewhere* on the instrument. Whenever a name appears on an instrument, and there is any doubt as to the capacity in which the person intended to sign, it is deemed to be the name of an indorser. (Sec. 36, Sub. 6.)

"*Allonge.*" It may be that the instrument has passed through so many hands that there is no further room for indorsement. The holder may then paste a piece of paper to the instrument, and sign his name thereon. That is what is meant by the words of the statute "upon a paper attached to it," and this act has received the French name of "allonge." It does not often occur, however.

Signature. The rules stated in Part 2 as to signature of the maker or drawer apply to an indorsement as well. Any form of words, or any signature from which the intent of the holder to indorse may be gathered, is a sufficient indorsement; and a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, *unless* he clearly indicates by appropriate words his intention to be bound in some other capacity. (Sec. 113.) For instance, "I hereby guarantee the payment of this draft," would be a guaranty and not an indorsement.

The usual form of indorsement is by a simple signing of the name, though we shall see that there are several kinds of indorsement.

Indorsement of the entire instrument. You can not indorse an instrument in part. If you indorse at all, you must indorse the entire instrument. (Sec. 62.) The reason for this is, that it would split the right of action on the instrument, and thereby create confusion. But suppose you hold a note for $500, on which $300 has been paid, and the instrument is not yet due. If you want to pass it over to another party, you can indorse it, and the indorsement will pass the title to the $200. (Sec. 62.)

Kinds of indorsement. Indorsements may be (1) special, (2) blank, (3) restrictive (including qualified), (4) conditional. (Sec. 63.)

Special indorsement. A special indorsement (sometimes called a "full" indorsement) is

one that specifies the person to whom, or to whose order, the instrument is payable. Of course, the signature of the party mentioned in the indorsement is necessary to negotiate the instrument further. (Sec. 64.)

The usual form of a special indorsement is as follows:

Pay to WM. BROWN or order JOHN SMITH.

Blank indorsement. Such an indorsement is a mere signing of the name of the party passing it without any additional words. It specifies no payee, and is payable to bearer. (Sec. 64.)

The indorsement being a contract, there is in a blank indorsement an implied right to the holder or indorsee to fill up and complete the written contract if he desires.

Suppose you get a note, on the back of which is signed simply the name of John Smith, the party from whom you took the note. You can, if you like, write over the name of John Smith any contract which would not render the note invalid. You can make it a special indorsement to yourself, if you like; or you can make it a special indorsement to any other party you see fit. (See form on page 54.)

By putting in the name of a third party, and passing it over to him, you need not sign it; and, of course, if he takes it without your signature, you avoid any liability upon it. But you can not write over the name of the blank indorser any words that change the contract

made by the indorser. He contracted by his signing to pay the instrument, provided it was not paid at maturity by the maker; and if you were to write the words "I hereby guarantee the payment of this note," you would change his contract and his rights; and the indorser would have a right to set up the defense of alteration, which avoids the instrument so far as he is concerned.

Suppose you take an instrument made by William Smith and payable to John Jones or order, upon the back of which is written the following:

JOHN JONES.
JAMES ROBINSON.
Pay to the order of BENJ. FRANKLIN,
WILLIAM ROBINSON.

Form of indorsement as it came to you.

JOHN SMITH.

You may write over the name of
JOHN SMITH
Pay to order of (WM. BROWN—yourself)
or
Pay to order of (SAM JONES—a third party).

And Franklin transfers it to you without indorsing it. It seems that Franklin may do this, and the note is good in your hands as against Smith the maker, Jones the payee and in-

dorser, and James Robinson the indorser, but you can not hold Franklin or William Robinson. The reason is, that Franklin never signed it, and your title to the instrument did not come through William Robinson, but through James Robinson and John Jones. (Sec. 70.) In the language of the statute, an instrument payable to bearer—as this is with the blank indorsements of Jones and James Robinson—and then specially indorsed, is still a bearer instrument, and may be negotiated as such; and the person indorsing specially is liable *only* to parties who make title through him. There is an apparent inconsistency between this proposition, based as it is on Sec. 70, and Subd. 5 of Sec. 28, which says that the instrument is payable to bearer "when the only or last indorsement is an indorsement in blank." If we rely upon this section, then this instrument is not a bearer instrument, and can be transferred only by the indorsement of Franklin. As between the two positions the latter is more sound. A holder may disregard or strike out any indorsements which are not necessary to his title, as the instrument of William Robinson, or any which may follow William Robinson, and hold the blank indorsers. By doing this, however, any party whose name has been struck out will be relieved from any liability that he might have had on the instrument. (Sec. 78.)

Restrictive indorsement. Properly speaking, a restrictive indorsement makes the indorsee

the holder of the instrument, but does not make him the beneficial owner of it. It is an indorsement which expresses that it is a mere authority to deal with the instrument as the indorsement directs, and does not transfer the ownership of it. But the statute says that an indorsement which "prohibits the further negotiation of the instrument" is a restrictive indorsement, as "pay John Smith only." Sec. 66, Sub. 1.) But, so far as known, there is nothing to prevent John Smith from transferring the instrument, if he sees fit; though by so doing he would relieve his immediate indorser, who contracted to pay him and him only, in case the instrument was not paid by either the maker or previous indorsers. If the word *only* in the indorsement "pay to John Smith only," were left out, and the indorsement were simply "pay to John Smith," it would not restrict the indorsement, even though words of negotiation—*i.e.*, "or order," "or bearer," were left out. In such a case, John Smith has title to, or owns, the instrument absolutely, and can transfer it as he sees fit.

The usual forms of restrictive indorsement are: (1) That which constitutes the indorsee the agent of the indorser (Sec. 66, Sub. 2), as "pay D. or order for collection," or "pay D. or order to my use." In such cases the transferee is only the holder of the instrument, and does not possess the title. He holds it only as agent, and is entitled to receive payment, which must be placed to the credit of

the true owner. It was the common form of depositing instruments in banks, and is yet in some parts of the country, though the New York City banks have discontinued its use, and now generally insist on either a special or blank indorsement. (2) An indorsement which vests the title in the indorsee in trust for or to the use of some other person (Sec. 66, Sub. 3), as "pay D. or order for the account of B.," or "pay to D. or order to the credit of B." In this case title to the instrument is in the indorsee, but it gives the indorsee no right to negotiate or transfer the instrument on his own account, or for his own benefit, though he may do so for the purpose of properly giving the true owner credit.

Rights conferred by restrictive indorsement. As we have stated, restrictive indorsements do not pass the title or ownership of the instrument to the indorsee, but they do give to the holder or indorsee the right (1) to receive payment of the instrument, (2) to bring any action thereon that the indorser could bring in order to collect it. This enables the indorsee to sue in his own name on instruments given to him for collection. The old law was divided in opinion on this subject. Many courts insisted that, not being the true owner of the instrument, he must bring the action in the name of the true owner; while other courts allowed the action to be brought in the name of the holder. The statute now settles the matter wherever it has been

enacted, and the holder may now sue in his own name, even though he be acting as agent in the matter.

The restrictive indorsement further allows the indorsee to transfer his rights as such indorsee, when he is so authorized; but any holders to whom he transfers the instrument get no better title to it than he had. (Sec. 67, Sub. 3.) This is because a man can not transfer any better title to anything than he himself has at the time.

Qualified indorsement: Indorsement "without recourse." A qualified indorsement is one which limits the ordinary liability of the indorser. He becomes the mere assignor of the title. It relates only to his liability, and does not affect the negotiable character of the instrument. Such an indorsement is the addition of the words, "without recourse," to the regular indorsement (Sec. 68), and it means that when a man signs or indorses "without recourse," he incurs no liability as an indorser, but simply indorses it in order to transfer the title properly. For instance, Smith, the holder of a note, indorses it, by simply signing his name, to Green. Green writes the words, "without recourse," and signs his name, and then transfers it to Brown. Brown can not hold Green liable for it in case the maker, payee, or Smith does not pay it.

Conditional indorsements. Such an indorsement means that the title to the instrument does not pass until the condition stated in the

indorsement is fulfilled. Such indorsements would be, "pay to A. or order if he arrives at the age of 21," or, "pay A. or order unless before payment I give you notice to the contrary."

Such indorsements are rare. If they appear upon an instrument, the party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeeds, subject to the rights of the person indorsing conditionally. (Sec. 68.) When we say there are no American cases on the subject, and only one English case, it will be seen that such indorsements are hardly likely to occur.

Two or more indorsers. Where an instrument is payable to two or more persons who are not partners, each must indorse it, unless one has authority to indorse for all. (Sec. 71.)

Wrong name. Where the name of the payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature, (Sec. 73.) For instance, a note payable to John Smythe, whose correct name is Smith; a proper indorsement would be as follows:

JOHN SMYTHE,
JOHN SMITH.

Again, suppose William Jones uses the trade

name of Robinson & Co., and an instrument is drawn payable to Robinson & Co., Jones may indorse it either "William Jones" or "Robinson & Co.," as he sees fit. It would be better for him to sign "Robinson & Co.," and then add his own name, however, thus avoiding any dispute.

Who may indorse. The general rule in this matter is, that no one except the payee and a subsequent holder can be an indorser. Strictly, this rule would preclude an accommodation indorsement; but as we shall treat this subject of accommodation paper later in this part, it is enough to say here that the courts have found no insurmountable difficulty in charging the accommodating party as an indorser, and holding him to be within this rule.

Infant. An infant may transfer his title by indorsement, but he can not, of course, charge himself with contract liability. He is not liable, therefore, as an indorser, unless he chooses to be. See Liability of Infant, page 93.

Corporation. In England, corporations generally do not possess the power to issue negotiable instruments. In this country they have it to the fullest degree when acting within the scope of their authority and the paper is for corporation purposes, though they may be prohibited from issuing paper of some kinds; and they do not possess the right to become accommodation indorsers. But if they are prohibited from assuming liability on negotia-

ble instruments, and one comes to them in their name as payee, they can transfer their interest therein by indorsement, though like the infant, they would not be liable on the indorsement. Notice that I say *if they are prohibited.* Note again that in the United States, when a corporation is acting within the scope of its authority, it has general power to make and issue negotiable paper, and, of course, to take it.

Gift. A. takes a note payable to him as payee; he indorses it, and gives it to his friend B. as a gift. B. has the title, and can enforce it as against the maker, but not as against the donor—*i.e.,* the party who gave it to him.

Agent or other representative capacity. Where a party is under obligation to indorse in a representative capacity, he may do so in such terms as to relieve himself from personal liability. (Sec. 74.) This most frequently happens in case of an attorney, executor, or administrator. It is easily done by signing the name of the party you represent, and then adding your own name and title, as:

JAMES BROWN,
by WILLIAM SMITH, Attorney;
or The Estate of JAMES BROWN,
by WM. SMITH, Executor (or Administrator).

Unless you indorse in this way, disclosing the name of your principal, and the fact that you are acting only in a representative capacity, you will be held liable as principal. (Sec. 119.) A late case in New York has held that in the

case of an indorsement by an agent of the name of a corporation—the mere signing of the corporation name—without adding his own name, is sufficient.

Irregular indorsements. As respects one another, indorsers are liable *prima facie* in the order in which they indorse. Evidence is admissible to show that it has been agreed otherwise, however. (Sec. 118.) But let us take this case. We have the following note:

> NEW YORK, August 31, 1900.
> Six months after date, I promise to pay Samuel Borst, or order, Two Hundred Dollars.
> (Signed) JOHN DOE.

On the back of this note is found the following names:

> James Robinson,
> Samuel Borst,
> William Smith,
> Richard Jones.

You will see that James Robinson's name is above, and presumably a prior indorsement to that of Borst, the payee. This would be a case of irregular indorsement by Robinson. How are you going to hold Robinson? The question is one of great difficulty, and has re-

ceived numerous interpretations and rulings from the various courts. In England, according to the views of Professor Ames, they would not hold him liable at all. In Massachusetts they hold him as a joint maker. In Illinois as a guarantor. While in New York the rule has long been established that he is liable as a second indorser. The reasons for these various views are all logically worked out, but need not take up our attention. If it be that Robinson has put his name to the paper as an accommodation to Borst, he should not be held as a joint maker, and thus liable to Borst, because Borst has evidently not given him anything in consideration for his name. Of course, he is not liable to John Doe, the maker. His liability, then, is to Smith and Jones only. In other words, he is treated as if his name were after that of Borst instead of before—*i.e.*, as second indorser. This *was* the rule in New York. Note that the new act *seems* to change this, and to make him liable, even to Borst, as a first indorser; for the law says, "Where a person not otherwise a party to any instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third party, he is liable to the payee and all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer,

he is liable to all parties subsequent to the maker or drawer."

For an illustration of this position, substitute the word "myself" or "John Doe" for Samuel Borst in the above note.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

The question upon which all this discussion depends, is, whom was the irregular indorser accommodating? It may be that Borst would not take the instrument unless someone, to whom he could look for payment besides the maker, put his name on it; or it may be that Robinson simply put it on to accommodate Borst. Under the old rule, he had the right to introduce oral testimony to show this. Under the new rule, it *seems* he is not allowed to do so. The fact is, that the statute has not yet received judicial interpretation; and until it does, we do not quite know whether he is to be treated as a first or second indorser. A late case, decided by the Appellate Division within the last year, declared the irregular indorser to be a second indorser, in accordance with the old rule; and in the face of the new law, which declares otherwise. But this exact point did not squarely arise in that case, and the statement was mere statement and not opinion. A still later case, however, in which the question arose directly, allows oral evidence to be introduced in order to show the exact position of the parties. This, if adhered

to, would seem to solve this situation satisfactorily. But note that no provision seems to have been made for the irregular indorsement of a draft. One may sign for the accommodation of the acceptor. If, then, the instrument is payable to the order of the drawer, and the indorsement is for the accommodation of the acceptor, the indorser is clearly liable to the drawer-payee. If the instrument is payable to a third party and the indorser signed for the accommodation of the acceptor, then the indorser is clearly liable to the payee and all subsequent parties.

Time of indorsement. Unless an indorsement bears a date after the date of the maturity of the instrument, which is unusual, it is presumed that the indorsement was made *before* the date of maturity. This may be rebutted, however. One who takes an instrument indorsed at a date later than that of the maturity of the instrument takes an overdue instrument, and he can not be said to be a *bona fide* holder for value *without* notice. (Sec. 75.)

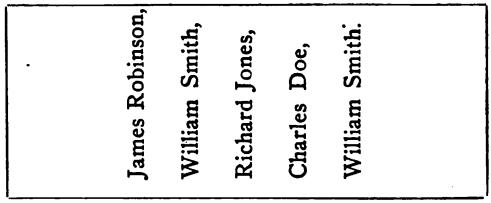
Place of indorsement. Unless it is shown to be otherwise, every indorsement is presumed to have been indorsed at the place where the instrument is dated. (Sec. 76.) It is a matter of some importance, for the instrument may be made in one State and indorsed in another. Indorsement is a contract in and of itself, separate and distinct from the contracts of the maker and others. Suppose the note to have been made in New York, and to have been in-

dorsed in New Jersey; then the laws of New Jersey would govern the indorsement, and the law of that State relating to indorsements might differ from that of New York.

Transfer without indorsement. When the holder of an instrument payable to his order transfers it for value without indorsing it, the party taking has just as much right and title in the instrument as the party had who transferred it, but no more; and he acquires the right to have the indorsement of the party who transfers. (Sec. 79.) Supose A. gives to B. a certified check. B., without indorsing, turns it over to C. C. stands in B.'s shoes; and even though he paid full consideration for it, and had no notice of anything being wrong, when he comes to receive payment he may find that A. will set up defenses showing that he need not pay it. If it had been properly indorsed, A. could not do this. It is his penalty for taking an unindorsed instrument. The reason is, that, by transferring it without indorsement, B. has merely *assigned* (not negotiated) the instrument. Assignment is not governed by the Law Merchant, but by the common law; and while equity will allow C. to show his interest in the instrument, it will also allow A. to show why the bill should not be paid. The act of indorsement is the negotiation of the instrument. The intention of the party may be all right, but intention to negotiate is not negotiation. So, if an instrument be transferred without indorsement, and it is after-

ward indorsed, the negotiation takes effect as of the time when the indorsement is actually made. (Sec. 79.) Of course, all this refers to instruments which *require* indorsement. Bearer instruments are not affected by it. The safest way out of the question is never to take an instrument requiring indorsement without the proper indorsement is on it.

Right to re-issue. Suppose we have a promissory note with the following indorsements on it:



An inspection of these indorsements will show that William Smith took the note from James Robinson, and passed it on to Richard Jones, who transferred it in turn to Charles Doe, who in turn transferred it back to William Smith, the second indorser. Of course, there is nothing to prevent this; nor is there anything to prevent William Smith from transferring it again to someone else, because an instrument once negotiable in the beginning remains so until it has been restrictively indorsed, or discharged by payment or otherwise. (Sec. 77.) But, in this case, William Smith can not enforce payment against either Jones

or Doe, because he was originally liable to them himself; and if he sues them, they in turn might sue him. (Sec. 80.) His only recourse is to sue all parties prior to and including Robinson, from whom he originally took the instrument.

Accommodation party, including indorsers. An accommodation party is one who has signed the instrument either as maker, drawer, acceptor, or indorser without receiving any value therefor, and for the purpose of lending his name to some other person. (Sec. 55.)

Who may be an accommodation party. Any person who can make a good contract can be an accommodation party. A partnership can be, though one partner has no implied power to sign the name of the firm; he must have authority to do so. A corporation can *not* be, because it would be a fraud on the stockholders, who put their money into the concern for specific purposes; and to be an accommodation party would be to put it to other uses than the law says the corporation may engage in.

Liability of. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. (Sec. 55.)

Diversion. In some States there is a doctrine which says that the accommodation party has the right to determine for himself what use shall be made of the instrument that he signs;

and if the conditions that he imposes are violated, the instrument can not be enforced against him. Suppose the A. Bank holds a note of Jones's for $100. Jones can not pay the note when due, and goes to Smith, and asks him to accommodate him with a note for $100, with which he can take up his old note at the A. Bank. Smith makes him a note, and gives it to him for this purpose. Jones, instead of taking up the note at the A. Bank, goes to the B. Bank, and gets the note discounted, stating that it is an accommodation note of Smith's, and the purpose for which it was given. The B. Bank discounts it, and, upon Smith's refusing to pay, brings action. Smith need not pay. Of course, this amounts to an agreement between the parties; and the agreement not being fulfilled, the accommodation party is not bound.

The question depends mainly upon the character of the diversion. If it is a material one, as in this case, then the party is not bound; if it is an immaterial one, then he is. Such a case would be where a party gives another a note which he is to discount at a certain bank, and he gets it discounted at another one. Such a diversion would be disregarded.

Had the B. Bank in this case discounted the note, knowing that it was an accommodation note, but not knowing that it was given for a particular purpose, they could not have recovered in New York, because the courts hold that the bank was bound to inquire into it.

Courts generally, outside of New York, hold differently in such a case, and they seem to have the best of it. Accommodation paper is a common thing in the commercial world, and the general rule is, that the accommodation purchaser, with mere notice of the accommodation, is a *bona fide* purchaser. And so it ought to be.

Discharge after maturity. It has been held in New York and a few other States that if an accommodation instrument is transferred after maturity, the accommodation party is no longer liable, because it was only his intention to give credit to the parties during the time stated in the instrument. This rule is not generally accepted by the majority of jurisdictions, and it is directly oposite to the English rule, and that of the common law. So far as known, it is good law in New York, Pennsylvania, Alabama, and Illinois, but not in other States.

No liability to the accommodated party. Of course, having given the instrument to the accommodated party without consideration, it follows that the accommodation party can not be sued by the accommodated party.

PART IV

A Bona Fide Holder (Purchaser) for Value Without Notice

Holder. "Holder" means the person in possession of the instrument, who, by law, is entitled to enforce payment thereof. The "holder" need not necessarily be the true owner, but he must have come into possession of the instrument legally; for instance, an instrument placed in the hands of a bank for collection. The bank is the holder, and is entitled to enforce payment of the instrument. This is new law, however, made so by the Negotiable Instruments Act. Prior to that time, there was much conflict of opinion, the prevailing rule being that the "real party in interest" must bring the action.

Holder in due course. (Sec. 91.) A holder in due course is a holder who has taken the instrument under the following conditions:

(1) That it is complete and regular upon its face. This means nothing more nor less than that the instrument must have the form and characteristics spoken of in Part II—*i.e.*, it must be complete as to date, parties, amount, etc.

(2) That he became the holder of it *before it was overdue*, and *without notice* that it had been previously dishonored, if such was the fact. If he acquired it after it was due, then he can not be said to be an innocent party,

because the law compels him to take notice of such facts. Such an instrument is usually good, however, and may be negotiated; but whoever takes it, takes it with notice that it is overdue, and thereby subjects himself to any defenses on the part of the previous parties, which defenses could not have been used had the instrument been taken before maturity. Such defenses may be fraud, duress (compulsion), failure of consideration, previous payment, and, in some States, accommodation. (See page 82.)

It is to be noted that the instrument is not due until the close of business on the day of its maturity, and so, transfers before that time —though on the day of maturity—are good, and render the holder a holder in due course.

(3) That he took it in *good faith* and for value. Good faith hardly needs comment. He must take it honestly, and with no intention of committing any fraud or deceit, nor should he take it with any intention of securing any illegal advantage over any one of the parties to it. *Bona fide* is the expression frequently used to describe this, as a *bona fide* holder.

Value. Sec. 50 of the new act says that every instrument is presumed to be issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value; while Sec. 51 declares that *value* is *any* consideration sufficient to support a simple contract.

Value is money or money's worth. We have

already stated under the subject of consideration that value may be:

(a) Money paid.
(b) Advances made.
(c) Credit given.
(d) Work and labor done.
(e) Dismissal of any suit pending.
(f) Release of right of dower.
(g) Compromise of a supposed cause of action.
(h) Marriage or promise to marry.
(i) Professional and other services rendered.
(j) "Good-will" of a business.
(k) In fact, any promise to the promisor in exchange for his promise.

This is so because each and every one represents money or money's worth. All are familiar with the meaning of the first four statements. In (e) "Dismissal of any suit pending," suppose A. to have a right of action against B. A. agrees to dismiss the action, in other words, to forbear the prosecution of the action, provided B. will give him his promissory note for $100. Here A. parts with value, or a right which is valuable, in exchange for B.'s note. So, too, in (g), B. may say to A., "I will give you my note for $100 provided you agree not to bring an action against me on a certain transaction.

In (f) B., the wife, agrees to surrender her right of dower in her husband's estate upon the delivery to her of a note for $10,000. In (h), A. promises to give B. $5,000, and does

give him a note for that amount, provided he will marry C.

And all of these considerations will support a simple contract, and they are value.

Some discussion has arisen as to whether "value" must be "full" or "fair," or both. The courts differ, and, in New York State, the cases show them at times adhering to all three interpretations. Probably the weight of authority inclines to *both—i.e.*, the value must be both full *and* fair as well as valuable. This does not mean that the owner of a bill may not sell it to whom he likes, and at any price he likes, for he may do so; and if he does, the party acquiring it, takes it with all rights and interests in the instrument as against all other parties. For instance, A. may hold a note of B.'s for $1,000. A. becomes pressed for money, and, finding no one will take the note at its face value, sells it to C. for $500. C. can recover from B. the full amount. Of course, the price may *carry with it* notice of fraud—*i.e.*, the price may be so absurdly small that the purchaser must know something is wrong. In that case he can not recover. As, suppose A. in the above case offered the $1,000 note to C. for $5; C. must know something is wrong, and his willful and fraudulent blindness would not permit recovery.

Thus far no difficulty as to what is or is not value presents itself. There are many instances, however, where value has been questioned, and we shall proceed to discuss them.

Pre-existing debts. There is now no doubt that a pre-existing debt is a valid consideration for a negotiable instrument. In fact, it is as frequently the consideration for paper as is a debt contracted at the time. There has been much controversy on the subject, but the matter is now settled in New York (where it was most unsettled), and all States where the Negotiable Instruments Act is in force, by Sec. 51, which says that "An antecedent or pre-existing debt constitutes value; and is deemed such, whether the instrument is payable on demand or at a future time." Such a debt might well be the following: A. buys goods from B. on sixty days' time; at the end of the sixty days A. can not pay, and gives B. a note for three months in payment, B. takes it, and parts for value in so doing. So, too, where one renews a note or draft. In the first case, the old debt is extinguished by merging it in the paper taken for it; while in the second case valuable negotiable security is given for it.

The merchant's view of the matter is, that a creditor who takes an instrument in payment of his debt merges the original debt in the new one—*i.e.*, the instrument. In other words, he suspends his rights of action upon the old debt, and relies entirely upon the new instrument. If, however, his action upon the instrument fails, he has his action upon the original debt; but he can not bring the one until he has brought the other. He may elect,

however, as to which he will sue on. If he elects to sue upon the original debt, of course he can not sue upon the instrument.

Debts of third persons. Suppose A. furnishes goods to C. at the request of B.; B. parts with value to A. There is here an implied if not an actual promise on the part of B. to pay, and this promise will support a bill or note from B. to A. So, too, whenever one person signs a bill or note in order to induce another to take it, the consideration or value is sufficient. This is the rule behind accommodation paper. For instance, A. promises B. that he will attach his name to a note provided B. will take the same from C.

Again, A. gives a note to B. provided B. will assume A.'s obligation upon another and entirely different note. This is parting with value, and is sufficient. So, too, where a father gives his son a note to be applied by the son as payment for a defalcation, the father receives value for his promise.

In fact, anything done for a third person by the promisee, and at the request of any person, whereby some advantage is given to the debtor or some disadvantage gained at the expense of the creditor, is sufficient value, and will support a negotiable instrument. As a general rule, the discharge of a debt of a third person will support a bill or note; but there are intricate questions involved in this rule, depending upon the State in which the instrument is executed and payable.

A. gives to B., the drawer, his acceptance on a draft. In consideration for this B. gives to A. as payee a draft on C. A. parts with value, and the second draft is good.

A. borrowed $150 from B. B. gave $100 in cash, and his note for $50. B. then took A.'s note for the whole amount, $150. B. parts with value, and A.'s note in B.'s hands is good.

A. possesses a note of B.'s for $100. C. buys B.'s note from A., giving to A. his note in exchange. B. then notifies C. not to pay his note to A., as the note he give A. originated in fraud. C. is a *bona fide* holder for value, and need pay no attention to B.'s warning.

Services. Professional services or services of any business character are sufficient to support a negotiable instrument, and the inadequacy of the services or the extravagance of the compensation are not material.

Good-will. "Good-will" is sufficient to support an instrument, even though the business afterward proves unsuccessful.

Note, etc., transferred as collateral security. Bills and notes are frequently transferred or pledged as collateral security, and, under the old law, many questions arose as to the rights of the various parties concerned in such transactions. The chief question was, whether the pledgee or indorsee became a *bona fide* holder. This question has now been settled wherever the new act obtains, by Sec. 51, which says, "An antecedent or pre-existing debt consti-

tutes value; and is deemed such, whether the instrument is payable on demand or at a future time." This changes the law on this subject in New York State. As stated in the text and several times by way of illustration, a pre-existing debt of the drawer, maker, or acceptor is sufficient value to support an instrument; and the creditor who receives such a bill or note is a *bona fide* holder for value, and fully protected from all equities as between the original parties.

Suppose A. gives P. a note for $1,500, due in ninety days, and tells him to use it to settle a particular debt owed by them jointly. P. does not do this, but goes to H. and borrows from him $750, giving him the note of A.'s as collateral security. H., upon P.'s failure to repay the loan, sues A., and tries to recover the full amount. A. proves misapplication by P. The court held that, though H. was a *bona fide* holder, he could recover only the amount advanced on the note. The rule, then, stands that whoever takes an instrument from a *wrongful indorser* as collateral security or as conditional payment, can recover only the amount of his advances. We have stated before that, had the instrument been free from restrictions—*i.e.*, in delivery, one could recover its full value, no matter what price he had paid for it, so long as the price was not so small as to carry on its face notice of fraud.

Suppose, again, that A. indorses a note to B. for $100, to be paid for by two installments

of $50. At the time B. gets the note, he pays one installment. Before he pays the second, he receives notice that A. obtained the note by fraud. B. subsequently pays the second installment. B. is a *bona fide* holder to the extent of $50 only. B. paid the second installment knowing the fraud, and he is not an honest purchaser for value beyond the $50, and he can not recover more. (Sec. 93.)

We have now reached our third step in the statement—a *bona fide* holder for value. The holder in due course must be such that, at the time the instrument was negotiated to him, he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it. This last clause brings us to the somewhat extensive question of notice.

Notice. A *bona fide* holder for value without notice is one who has taken the instrument honestly, and paid value for it, and who takes it without notice of any infirmity in the instrument, or any defect in the title of the person negotiating it. Notice is of two kinds—actual or constructive. Actual notice means that kind which is so evident upon the face of the instrument, or is so attached to the circumstances surrounding the transfer of the instrument, that the purchaser or holder has deliberately and dishonestly shut his eyes in order to avoid it. For instance, A. transfers a note for $100 to B. for the sum of $10; B. *suspects* that A. obtained the note by fraudulent representations, but makes no inquiries. In fact,

A. stole the note. B. is not a *bona fide* holder, being affected with notice. His suspicion and the small consideration asked was enough to put him to inquiry.

Actual bad faith must be shown in order to deprive a holder for value of the character of *bona fide* holder. (Sec. 95.) Neglect to inquire into the facts on the part of the holder is not conclusive of notice. Suppose a note had been lost, and the loser had advertised it in the newspapers. A. finds it, takes it to a bank, and has it discounted. If the bank can show that it took the note in good faith, and without notice of the way A. came by it, it can recover the amount of the note. This was gross carelessness, but even gross carelessness does not amount to notice. The bank, or any other purchaser for value without notice, does not owe it to the party who puts the instrument afloat the duty of active inquiry, to avert the imputation of bad faith. (Sec. 96.)

Suppose, again, that B., for an illegal consideration, accepts a draft drawn on him by A. A. indorses it before maturity to C., who takes it for value and without notice. C. indorses the bill, when overdue, to D. D. acquires a good title, for C. had a good title. It seems that D.'s title would be good even had he known the circumstances of the illegal consideration, because he secures by transfer all the title which C. (who gave value and had no notice) had. (Sec. 97.)

One who purchases an instrument is con-

clusively taken to have read it. There are certain facts stated in every instrument, and apparent upon the face of the instrument. A purchaser must take notice of these to his peril. Among them may be enumerated: (1) a restrictive indorsement, (2) a conditional indorsement, (3) time of payment, (4) marks of dishonor, (5) a signature "per procuration." In such cases, no direct information has come to the purchaser, but he is charged with knowledge of the defect whether he knows it or not. This kind of notice is called "constructive." Partnership paper used to pay a private debt of one of the partners is a somewhat troublesome question. The rights of a creditor who takes such an instrument will vary greatly according to the form of the instrument. Perhaps the best that can be said of such paper is, do not take it unless there accompanies it a statement showing it was issued by the authority of all of the partners.

The same statement holds true in the matter of paper upon which a partnership name appears evidently as an accommodation indorser. In such a case, the purchaser must prove at his peril that it was given with the consent of all of the partners.

The words "without recourse" added to an indorsement do not carry either express or constructive notice of any infirmity in the paper. Nor does the mention in an instrument of the consideration affect a purchaser with notice of its failure. Under such condi-

tions, we have a *bona fide* holder for value without notice. Every holder is deemed to be such a holder unless it is shown to the contrary. If this is shown, then the burden is on the holder to prove his position. (Sec. 98.)

Defenses or "equities." In an action upon a negotiable instrument, the plaintiff must show (1) execution of the instrument by the defendant, (2) its transfer to himself through the proper parties, (3) presentment of the instrument for payment, (4) refusal, (5) protest (when necessary), and (6) notice of dishonor (when necessary). Despite all this, the defendant may have a valid defense; and, while not disputing the plaintiff's title, he may bring forward certain facts which may render the plaintiff's title worthless. There are certain defenses which are good as against the world. It does not matter then whether the plaintiff be an immediate or a remote party, or even a purchaser for value without notice, so far as the maker, or drawer, or acceptor, as the case may be, of the instrument is concerned. Such defenses are:

Infancy.

Married woman (in States where no statute exists to the contrary).

Insanity.

Extreme intoxication.

(In all of the above cases, none of the parties can make a binding contract.)

Usury.

Gaming (in States where the statute makes such contracts *absolutely* void).

Cancellation.

Alteration.

A cancellation made unintentionally, or under a mistake, or without authority of the holder, is inoperative. (Sec. 204.)

In the case of an alteration, if the instrument is in the hands of a *bona fide* holder for value without notice, he may enforce payment of the instrument according to its original tenor. (Sec. 205.)

On the other hand, there are certain defenses which are available between immediate parties, or any who stand in privity (direct relation) to them; but they are *not good as against purchasers for value without notice.* Such defenses are:

Fraud.

Duress (compulsion).

Failure of consideration.

Usury and gaming where the statute renders them simply *void.*

Premature payment, or accord and satisfaction.

Mutual mistake in making the instrument.

Any of these may be set up as a defense between the maker, or drawer, or acceptor, and the payee, or the payee and his indorsee, etc.; but in the hands of *bona fide* purchasers for value without notice, they are of no avail.

PART V

Liability of Parties

Every party to a negotiable instrument, whether he be drawer or maker, acceptor or indorser, enters into a contract which, in some respects, differs from that entered into by each of the other parties named. This contract carries with it certain liabilities which he can not evade, and it is of these liabilities we shall treat in this chapter.

Maker. The maker of a promissory note engages that he will pay it according to its tenor, and admits the existence of the payee, and his then capacity to indorse. (Sec. 110.) "According to its tenor" means that he will pay the note at the time stated, at the place stated, the amount stated, and to the payee stated or his indorsees; or if the instrument be a bearer instrument, to the holder thereof, upon its presentment and surrender by the holder. This he engages to do at any reasonable hour of the day of maturity, or of any subsequent day if not presented when due. The maker is a debtor, it is true, but his liabilities differ from those of an ordinary debtor in several particulars: (1) If the instrument is not presented for payment and surrendered, the maker is not bound to pay. An ordinary debtor is not subject to any con-

dition whatsoever. (2) If the instrument does not state the place of payment, it is to be paid at the maker's residence or place of business. This means that the creditor must seek the debtor, while ordinarily the case is reversed, and the debtor seeks the creditor. (3) In an ordinary debt, the debtor has until midnight of the day the debt is due in which to pay. In the case of a note or draft, the holder determines the time. He must present the instrument for payment at a reasonable time—*i.e.*, within business hours if it is payable at the maker's office; and between the hours of rising and retiring if payable at the maker's residence. As to the necessity for presentment, we shall speak later (see pages 104, 118).

Drawer. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse; and engages that, on due presentment, the instrument will be accepted or paid, or both, according to its tenor; and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. (Sec. 111.) "According to its tenor" means here just what it means in the statement made above concerning the maker. Note that the drawer's liability is only a secondary one. The party primarily liable on the draft or bill of exchange is the acceptor, and the drawer only agrees to pay when the bill or draft has been presented to

the acceptor and payment refused by him. Note, further, that the drawer is entitled to notice of the dishonor of the instrument by the acceptor before he becomes liable. Unless such notice is given, he can not be called upon to take up the bill. Of course, if the drawer pays the bill, he has the right to and should have the bill presented to him and surrendered. So, where a drawer tendered payment upon condition that the bill be surrendered, it was held to be a good tender. Because of this principle it follows that a drawer can not be charged at law if the bill is lost or destroyed.

There is some division among the courts as to just what time the holder may begin his action against the drawer. Some hold that it may be begun the moment notice has been sent to the drawer, whether he has received it or not (Maine, New Hampshire, Massachusetts, etc.); while others hold that no action can be begun until notice has been received by the drawer (New York, California, etc.). Of course, a drawer must make payment at his place of business or residence, if no other place is mentioned in the bill.

Amount to be paid. The holder is entitled to receive the amount specified in the bill. *In addition to this*, the drawer is chargeable with notarial fees, and *with interest* from the time the dishonored instrument *should be* (not is) presented to the drawer until it is paid by him. Of course, if the instrument bears interest, then interest from the day the instru-

ment was made to the day of its maturity must be added. Note, however, that the latter is only the fulfillment of the contract of the drawer, while the former is in the nature of a penalty. There is some division of opinion among the cases as to just when the interest by the way of penalty begins to run, but the above statement (from time the dishonored instrument is presented to the drawer) is borne out by the weight of opinion. The rate of interest is sometimes a question of importance. The instrument itself may bear interest at any rate not usurious. The rate to be paid as penalty depends upon the legal rate of interest prevailing in the State in which the drawer resides, and is always measured by this.

Exchange. If the place where the drawee or acceptor resides, and where the bill or draft should be paid, differs from that of the drawer, and exchange is charged for collection, etc., then the drawer is chargeable with this, too.

Drawee. The drawee of a bill or draft incurs no liability (as drawee) to the holder. The drawee of an unaccepted bill or draft is not bound to accept or pay it unless he has, for valuable consideration, expressly or impliedly agreed to do so. If he has agreed to do so, then his relations to the drawer are regulated by the terms of the agreement. This statement is not true, however, as to a bank. We shall see later on that a bank is bound to honor its customers' checks.

Acceptor. The liability of the acceptor is

exactly that of the maker of a promissory note (see above). To this liability there is added what are known as warranties, namely, the acceptor admits (1) the existence of the drawer, the genuineness of his signature, and his (the drawer's) capacity and authority to draw the instrument, and (2) the existence of the payee and his then capacity to indorse. (Sec. 112.) The reason for (1) is, that the acceptor ought not to have accepted the bill without knowing whether or not there was such a person as the drawer. He must be satisfied of all these before he accepts; and having once accepted, he will not be allowed to deny them. If it turns out that the draft was wrongly drawn, or forged, or the drawer had no capacity nor authority, and he accepts, then he is bound and must stand the loss. The leading case in illustration of this point is that of *Price vs. Neal*, reported in *3 Burrows, 1354*. Facts are as follows: Price brought an action against Neal to recover from him the amounts paid by him on two drafts, of which Price was the drawee and acceptor. One of these drafts had been paid by Price without a previous acceptance, while the other was duly accepted and afterward paid at maturity. Later, Price discovered that the drawer's name had been forged to both drafts. The court held that it was the duty of the acceptor to be satisfied as to the drawer's existence, signature, capacity, and authority before he accepted and paid the drafts; and that it is not

the duty of the holder to inquire into these things; and because of this, Price could not recover the money advanced to Neal on the drafts.

To secure the ready circulation of negotiable instruments, a person may not dispute the power of another to indorse an instrument when he asserts by the instrument which he issues and circulates that such power belongs to the other. The drawer holds out to all the world that there is such a payee as is described in the instrument, and that he has a right to order the instrument paid to someone else if he desires it. The drawee, by accepting the draft, assents to both of these propositions. He can not then attack the capacity of the payee to indorse, nor can he attack his existence. But further than this the acceptor warrants nothing in the matter of the payee. He does not admit the genuineness of the payee's indorsement or any subsequent indorsements, nor does he admit that all the terms used in the draft at the time he accepts are genuine. He is not in a position to know whether, for instance, the draft has been altered, nor does he know anything about the signatures of the payee or indorsers.

The following excerpt, taken from the English Bills of Exchange Act, shows the liability of the acceptor to the drawee. If evidence shows these positions, the rules as here laid down will be enforced:

"Where a bill is dishonored the measure of

damages, which shall be deemed to be liquidated damages, shall be as follows:

"The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the aeceptor, or from the drawer, or from a prior indorser.

"(a) The amount of the bill.

"(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case.

"(c) The expenses of noting, or when protest is necessary, and the protest has been extended, the expenses of protest.

"Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill."

Indorser. The liabilities of the indorser are exactly those of the drawer (which see page 85). We have already explained who is deemed an indorser, and the liability of the irregular indorser (see page 62, under Indorsement). Certain warranties attach to the liability of the indorser, quite as much as they do to the acceptor, however, in addition to the liabilities described under Drawer. These are as follows: The indorser who indorses without qualification warrants to all subsequent holders in due course (1) that the

instrument is genuine, and in all respects what it imports to be; (2) that he has a good title to it; (3) that all prior parties had capacity to contract; and (4) that the instrument is at the time of his indorsement valid and subsisting. (Sec. 116.) Like the drawer, he engages that, upon due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor; and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

The position of the indorser is a double one —that of transferer of title, and as maker of an entirely distinct contract. In transferring the title, he promises indemnity to the holder provided there exist any latent defects of which he is not aware. By transferring this title, he agrees that if defects exist, he will not avail himself of them. To do so would be bad faith. In indorsing, then, he makes a distinct contract, in which he binds himself to various promises or warranties. He warrants the validity of the instrument, agreeing that if the paper can not be enforced against the acceptor or maker because of some illegality in its inception, such as paper tainted with usury, or given for a gambling debt, or any other illegal consideration, he will not avail himself of these defenses, but will pay the instrument himself. So, too, he warrants the capacity of the parties. If the paper can not

be enforced against the original parties because of infancy or agency, or any other reason making the parties incapable of contracting, he will pay it, and not defend on any of these grounds. The same reasoning holds good as to title and right to transfer. Suppose he indorses, unknowingly, an instrument which was stolen, and the original parties refuse to pay. He can not say that this is a good defense, because he held himself out as having good title, and therefore a right to transfer.

By this new law of Sec. 116, a change has been made from the old. Under the old law, a bank acting as a mere collecting agency, and which had paid over the proceeds of a check to its depositor, having received the amount of the check from another bank, was not obliged to refund any part or all of the amount, if it was found that the check had been raised. Under the new law, a bank as agent is under the same liability as any other indorser, and in an action to recover, would be obliged to pay.

Irregular indorsements we have already spoken of (see pages 62, 63).

Indorsement of a bearer instrument. Where one puts his name to an instrument which is negotiable by delivery, he becomes liable as an indorser thereof, and incurs all the liabilities of an indorser. (Sec. 117.)

Accommodation party. As to the liability of, see same title, page 68.

Agent or broker. As to liability of, see same title, page 61.

Indorser without recourse. (See Qualified Indorsement, page 58.) An indorser may relieve himself from his liability to pay the instrument in case the original parties fail to do so by indorsing it "without recourse." Such an indorsement is equivalent to transferring the instrument by delivery, and carries with it the same liability as attaches to one who thus transfers an instrument. Such an indorser does not bind himself to pay the instrument, but he does become responsible to his immediate transferee for the validity of his title, and the genuineness of the instrument which he transfers. For a more elaborate statement, see Transfer by Delivery, page 97.

Infant. Generally speaking, an infant incurs no liability on an instrument by becoming a party thereto, though he may indorse and transfer the title, and such indorsement and transfer is good. The question of an infant's liability on such a contract is one of considerable complication. Under the old law, an infant could not bind himself, even though the instrument was given for necessaries. "This is not generally regarded as law now." A general statement drawn from the text writers on the subject is here given. Between immediate parties, an infant being one, the instrument is voidable, not void. In other words, the infant may repudiate it or not, as he sees fit. There is not much difficulty here,

but when the instrument gets into the hands of a holder for value without notice, the difficulty becomes greater. An instrument given by an infant for necessaries is probably binding in everyone's hands, and this is true, also, in cases where the infant does not raise the point in his own behalf; and it is especially true, provided the infant ratifies the instrument upon coming of age. But the weight of opinion from the adjudged cases seems to be that even the purchaser for value without notice occupies a position inferior to that of the infant, who may rescind his contract. The best that can be said is, that the instrument is good until disaffirmed. The inconsistency of the whole matter is apparent. A negotiable instrument must be payable absolutely and at all events. Under such circumstances—*i.e.*, infancy, it can not be. All this does not mean that an infant can issue a negotiable instrument, use the proceeds, and then avoid the instrument by pleading infancy. If he disaffirms the contract, he must return the consideration. It is submitted that the old law is correct law, and that an infant can not bind himself by a negotiable instrument, even for necessaries.

Corporations. Corporations have the power to issue, indorse, and transfer negotiable paper if done for the purpose of its incorporation. When this is done, their liability is the same as that of a private individual; and if their paper be in the hands of a purchaser for value without notice, they will generally be held,

even though the transaction be beyond and outside of their chartered rights. This is especially true if they have received a benefit at the expense of someone else. Having general power to issue negotiable instruments, the old rule of notice, whereby every person is bound to take notice of their limitations, powers, etc., is fast disappearing, and the more sane rule of holding a corporation liable for all of its transactions where benefits are derived is obtaining.

PART VI

TRANSFER

We have already noticed what instruments are negotiable, and the words necessary to make them so. It now remains for us to treat of the methods of transfer, much of which has already been referred to. But two methods of transfer are in common use, yet there are one or two other methods which we shall have occasion to mention. In this chapter, then, we shall treat of:

Transfer by Indorsement.
Transfer by Delivery.
Transfer by Operation of Law.
Transfer in Trust for the Transferer.
Illegal Transfers.

Transfer by indorsement. While much of this subject has already been treated under Indorsement (which, see page 51), it will bear repeating—that the title to a bill or note payable *to order* can be transferred only by indorsement. But if such an instrument is delivered without indorsement, the beneficial interest to the instrument passes, and the transferee may secure the legal title by a subsequent indorsement of the transferor; and, if necessary, may in equity compel the indorsement of the transferor. This is true in the case of a bankrupt, or a married woman, or of the rep-

resentatives of the estate of a dead man. For instance, A. transfers an instrument to B. without indorsement. One week afterward, A. becomes a bankrupt. The indorsement of the instrument by A. at the time, even though he is a bankrupt, will put B. in possession of the legal title. The reason for this is, that nothing passes to the assignees of a bankrupt except property that really and beneficially belongs to him. This instrument did not, for the beneficial interest was passed some time before.

Of course, the purchaser of a negotiable instrument who obtains title without indorsement takes it subject to equities or defenses which may exist between original parties; but of this we have already treated (see page 82).

So, too, the indorsement of a married woman. In States where no statutes exist, a woman's marriage potentially passes all choses in action (negotiable instruments, etc.) to her husband. Her indorsement after marriage, provided the instrument had been transferred before, would be all right.

The delivery of an instrument without indorsement does not give any authority to the transferee to write an indorsement thereon in the name of the transferor, nor in any way to change the names of the indorsers so as to put his own name on.

Transfer by delivery only. The title to paper payable to bearer, or indorsed in blank, may be transferred by delivery, even though there are subsequent special indorsements; and such

a delivery passes the title to anyone who takes up the instrument, whether he be a prior holder or a stranger taking it for honor. Delivery is necessary, however, and all that is necessary. As to what a good delivery is, see page 24.

Warranty where negotiating by delivery. Every person negotiating an instrument by delivery, or by a qualified indorsement, warrants (1) that the instrument is genuine, and in all respects what it purports to be; (2) that he has good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. (Sec. 115.) This covers transfers by delivery where there is no indorsement. Any and every person who takes an instrument, and passes it on to another, warrants all these facts when he so passes it. But note that he warrants them only to the party to whom he transfers, and not to subsequent holders. The fact is, that transfer by delivery is treated in the nature of a sale of goods or chattels. Whenever an article is sold, and some latent defect exists known to the seller but not to the purchaser, the former is liable for this defect if he fails to disclose his knowledge on the subject at the time of sale. The courts put this on the ground of fraud and implied warranty, as the case may be, fraud if the seller has actual knowledge of the defects, or implied warranty where there exist facts such

as he might have inferred from the circumstances and conditions of the sale. In other words he is presumed to know of such defects. So, where the maker or acceptor will not pay the instrument for any other reason than forgery, then the transferor, by delivery without indorsement, is not liable for the defect in the instrument which prevents recovery upon it, unless he knows of, or can be presumed to have known of, the defect. If he knew of it, then he commits fraud. If it can be presumed, there is an implied warranty that he knows the defects. This is not true in the case of forgery, however, unless the vendor knew of the forgery, and knowingly transferred the instrument. In the case of forgery, the instrument never had any inception, and can never have.

The statements above made as to transfer by delivery show the rule in New York, in the United States courts, and in England. They have not been distinctly decided in other States in this way, though there is good reason to suppose that the other States will follow this method of reasoning in time. A transfer "without recourse" is equivalent to transfer by delivery, and the same liability attaches to the indorser and transferor "without recourse" as attaches to the transfer by delivery.

Transfer by operation of law. All transfers are transfers by operation of law, but this section is intended to treat of transfers other than by delivery or indorsement. The in-

stances where this occurs are not many, but there are cases where a negotiable instrument may be transferred without either indorsement or delivery.

Death of holder. Such would be where the holder of the instrument dies. The instrument then passes with its title to the representative of the deceased holder, and the representative as such has the right to indorse and transfer when necessary to properly settle up the affairs of the deceased.

Bankruptcy. Upon the bankruptcy of the holder, negotiable paper held by him passes by operation of law into the hands of his assignees, who as such may indorse and transfer within their rights in settling up the affairs of the bankrupt. If, however, the paper was made for the accommodation of the bankrupt, then it is of no value in the hands of his assignees, and does not pass to them unless by agreement on the part of the accommodation party.

Marriage. As stated before, where no statutes exist to the contrary, marriage potentially vests title to all negotiable instruments held by the wife before marriage, in the husband, who becomes the legal holder of them, with the right to indorse and transfer in his own name. Indeed, the wife has no right either to indorse or transfer, though she usually does indorse with her husband. These common law disabilities have been removed in many of the States, notably in New York; and the

wife may now hold, indorse, and transfer in her own name with the same freedom as a single woman.

Partnership. Upon the death of one of the partners, the partnership is dissolved, and negotiable paper vests in the surviving partners, who no longer have implied authority as partners to impose the liability of indorser upon their co-partners. The indorsement should be made by or with the consent of all the surviving partners, or should be made without recourse.

In trust for the transferor. The law now allows the holder of an instrument to bring any action in his own name he may deem necessary in order to collect the instrument, and payment to him will discharge the instrument. (Sec. 90.) This is a change from the old law, where only the party in interest could bring the action.

The pledgee of an instrument may transfer the title to it, taking so much of the proceeds as will satisfy his demands, and holding the balance for the benefit of the pledgor. This is unlike the pledge of other chattels. In negotiable instruments, the pledgee is intended to have the right to enforce payment of the instrument, and may do so by transferring it as above.

Fraudulent transfers. It has been stated that as between immediate parties fraud and illegality in transferring negotiable instruments carry the same consequences as they do in

the sale of any other chattel. The title of the fraudulent transferee is good until it has been attacked by the transferor.

Transfers made on Sunday, except in those States where statutes exist making it unlawful, are good, and pass the title to the instrument.

Remember the statement made previously in this work, that where the transaction is made *absolutely void* by the law, transfers of such instruments carry no title and no right of action.

Sale. A. indorses a note for $500 payable in three months to B. for $400, which is much less than the face value minus the discount. This is a *sale* and not a loan, and can in nowise be placed under the head of usury.

Who may transfer. While this subject has been treated of in the several parts of the book, for the sake of clearness the following statements are collected:

(1) Only he who has the title to an instrument can transfer it.

(2) If held by several jointly, all must transfer and all must indorse, unless one be authorized by all to do so. This is true even though they be partners.

(3) Any one of several executors may *indorse* a note payable to their testator, though all must join in the transfer—*i.e.*, all must consent.

(4) Title to an instrument, the holder of which dies, passes to his representative, and only the representative can transfer it.

(5) In case of bankruptcy, the assignees are

the only ones who can transfer instruments held by him.

(6) In case of marriage and during the continuance, unless the common law disability be removed, only the husband can transfer paper held by the wife before marriage, or executed to her after marriage.

(7) An infant can transfer an instrument, although he may avoid the transfer of it at any time until it gets into the hands of a purchaser for value without notice. (See Liability of Infant, page 93.)

PART VII

Presentment of Drafts for Acceptance

The acceptance of a draft or bill of exchange is the signification by the drawee of his assent to the order of the drawer. (Sec. 220.) In other words, when the drawee of a draft or bill, to whom the draft has been presented, says he will accept it, he promises that he will pay it when it matures, either to the payee or to any party to whom the payee may transfer it.

The acceptance must be in writing and signed by the drawee. (Sec. 220.) In England the rule is that the acceptance must be in writing and upon the bill or draft itself. This became settled law in 1856, and since that time no dispute has arisen on the subject. But in the United States this rule does not apply. While holding that the acceptance must be in writing and signed by the drawee, the law gives to the holder the right to require the acceptance upon the instrument itself if he desires it, allowing him the right to treat the draft as dishonored if the drawee refuses (Sec. 221); but it also allows the acceptance to be written on a separate piece of paper. This will include an acceptance by telegraph, which has been held to be within the terms of the statute. It must be noted, however, that such

an acceptance will not bind the acceptor, unless it has been shown to a party, and this party takes the draft or bill, relying upon the faith of this separate acceptance. Such party must be a holder for value. (Sec. 222.) The law goes even further than this, however, and allows an acceptance to be made before the draft is drawn. A. goes to B. and says he will draw on him for $500. B. gives him an unconditional promise in writing that he will accept a bill drawn upon him by A. for $500. B. then shows the acceptance to C., who says he will take the bill upon A.'s promise to accept. B. draws it, and C. can enforce the acceptance against A. It would be otherwise, however, if the party taking the draft knew nothing of the promise to accept. He could not then enforce the draft against B. (Sec. 223.) The rule, then, is that a draft may be accepted before it is drawn, but only upon certain conditions: (1) The contemplated drawee must promise—upon the draft's being described to him—to accept it. (2) The draft must be drawn within a reasonable time after the letter is written. (3) The holder shall take the draft upon the credit of faith of the promise to accept. The position of the United States upon this subject is to be regretted.

No one but the drawee can accept a draft. (Sec. 220.) This is the rule generally, unless it be for honor; but this does not preclude an agent from accepting for his principal if he is duly authorized. A partner may accept for

his firm, though he must be authorized by the firm to do so, otherwise it would be void as against the partnership, though good against the partner personally.

Time of acceptance. The drawee is allowed twenty-four hours after presentment in which to decide whether to accept or not. (Sec. 224.) If he retains the bill more than twenty-four hours, refusing to return it, or if he destroys it, he will be deemed to have accepted. (Sec. 225.) This last section is contradictory in its language, and is not in accordance with the old law on the subject. Just what it means will have to be decided by the courts. It will be noted, however, that the instrument must be demanded, otherwise it will not amount to an acceptance. Permission may be given to the drawee to retain it for a longer period than twenty-four hours. Under such circumstances, a demand and a refusal to return before the expiration of the time granted will not constitute an acceptance.

The draft contains generally only an order to pay, but coupled with it is an implied order by the drawer to the drawee to promise to pay it according to the tenor of the draft—*i.e.*, at the time and place stated, the amount stated, and the payee designated, or to his order.

Kinds of acceptances. A general acceptance is one which assents without qualification to the order of the drawer. For this purpose, an acceptance to pay at a particular place is a general acceptance, unless it expressly states

that the bill is to be paid there only and not elsewhere. (Sec. 228.) For instance, "Pay C. or order $100 at 30 Broad street, etc." If accepted, payment *may* be made anywhere else, and it would be all right. Such an acceptance would be a general one. If the draft read, "at 30 Broad street only, and not otherwise or elsewhere," it would be payable there and nowhere else; and such acceptance would be a qualified one.

Qualified acceptance. A qualified acceptance is one which in express terms varies the effect of the draft as drawn. Such an acceptance may be (Sec. 229):

(1) *Conditional,* making payment by the acceptor dependent upon the fulfillment of a condition therein stated. As the following, written across a draft: "Accepted—payable on surrender of bills of lading for cotton, per ship 'America.'" Or, again, "Accepted—payable when in funds."

(2) *Partial,* or restricted as to amount. As, A. draws on B. for $100; B. accepts as to $50. Or, A. draws a draft on B. for $100; B. accepts it payable $50 in cash and $50 in goods. This would be good as to the cash, but not as to the goods.

(3) *Local,* or restricted as to place of payment. As, draft addressed to "B., of Utica," and it is accepted payable at Syracuse, N. Y.

(4) *Qualified as to time.* As, A. draws on B., payable in two months after date; B. accepts, payable in three months after date.

Again, A. draws on B., payable at sight; B. accepts it, "payable in fifteen days."

(5) The acceptance of some one or more joint drawees, but not of all. As, draft drawn on A., B., and C.; A. accepts, B. and C. refuse to accept.

Rights of parties as to qualified acceptances. The holder may refuse to take a qualified acceptance; and if he does not obtain an unqualified acceptance, he may treat the draft as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assented thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto. (Sec. 230.)

The language of this section is plain enough, and the rules therein stated are the rules which have obtained for some years past. For the sake of clearness, we will separate them:

First. The holder may refuse a qualified acceptance. He is entitled to a general acceptance, and, if it is refused, may treat the draft as dishonored. Suppose A. draws on B. for $500, payable in sixty days, in favor of C. C. asks B. for an acceptance. B. says he will accept at six months and not for sixty days. C. may treat the draft as dishonored.

Second. In the illustration, if C. had taken the acceptance at six months, he would have discharged A., unless A. had authorized it or assented to it. It changes A.'s contract, and no one can do that except A. himself, therefore he would be discharged. Suppose C. had informed A. of this qualified acceptance, and A. had said nothing, and gave no notice to C., either one way or the other, within a reasonable time. Under such circumstances A. would be deemed to have assented to it, as it was his duty to protest if he was not satisfied.

Acceptance of incomplete draft. A draft may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. (Sec. 226.) We have before stated (see page 541) that the acceptance of an unsigned draft would make the draft a promissory note, the acceptor promising to pay to the payee the amount named, and there being no one secondarily liable. If an acceptance be made while the draft is incomplete, the drawer or the holder may complete it by filling in the blanks in any way he sees fit, unless there is an agreement between the parties as to time, amount, etc. Under such circumstances, the agreement must be lived up to. It has even been held that the acceptor has the right to fill in the drawer's name, and he might even put in his own name as drawer. Where a

draft has once been dishonored by refusal or non-payment, it may be accepted later on, if presented; and if it is accepted, the acceptance will date as of the first presentment. (Sec. 226.) For instance, A. draws on B. at three months in favor of C. C. presents the draft to B. for acceptance. A. has no credit with B. at the time, and B. refuses to accept. Later, A. arranges the matter with B., and tells C. to present it again. B. then accepts it, and the acceptance dates as of the first time of presentment.

Form of acceptance. Any words written by the drawee on a draft, not putting a direct negative upon its request, as "accepted," "presented," "seen," the day of the month, or a direction to a third party to pay it, and signed by the drawee, is a complete acceptance. The usual form is for the drawee to write the word "accepted," the date, and his own name across the face of the draft. To this may be added the place where the draft will be paid. A mere writing of the name at the bottom or across the face of the bill is enough, however. The following are common forms:

(1)

Accepted.
Payable at 40 Wall St.,
June 1, 1900.
JAMES ROBINSON.

(2)

Accepted.
June 1, 1900.
JAMES ROBINSON.

(3)

JAMES ROBINSON.

Delivery. Notwithstanding good authority to the contrary, an acceptance is not good unless completed by delivery. (Sec. 2.) As to what is a good delivery, see page 24.

Oral acceptances. Except where statutes exist requiring acceptances to be in writing, a mere oral promise to pay is treated as a valid acceptance of a draft. In England, and in those States where the Negotiable Instruments Act exists, such acceptances are no longer good.

Acceptance for honor. An acceptance for honor is an undertaking by a stranger to pay the draft after it has been protested, whereby he intervenes, with the consent of the holder, and accepts the draft for the honor of some party liable upon it. In doing so, he promises to assure the payment of the draft to all parties subsequent to the party for whom he accepts, in case the drawee does not pay it when it becomes due. (Sec. 280.) Being accepted in this way—*i.e.*, after having once been protested, it is called acceptance for honor supra protest. This rule is an exception to the general rule that no one may accept a draft except the drawee. It is not commonly met with in this country, but provision has been made for it in the Negotiable Instruments Act. (Secs. 280-289.) Unless the acceptance for honor expressly states for whose honor it is made, it is deemed to have been made for the honor of the drawer. (Sec. 282.) But it may be made for the honor of any of the parties to the draft—

acceptor, payee, or indorser, as well as the drawer.

Partial acceptance. The acceptance for honor may be for a part only of the sum for which the draft is drawn; and where there has been acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. For instance, in the following draft:

NEW YORK, August 1, 1900.

Thirty days after date pay Samuel Jones or order $500.

JAMES ROBINSON.

To WILLIAM JONES,
14 Broad Street, New York City.

Indorsed:

SAMUEL JONES,
THOMAS WILLIAMS,
GEORGE BROWN.

The draft has been presented and acceptance refused, and then protested. John Douglas, a stranger, then accepts for honor. Unless he states the party for whose honor he accepts, he accepts for the honor of James Robinson, the drawer. But he may accept for anyone, and if he does he must state for whom. For instance, he may accept for the honor of Samuel Jones. If he does, then he is liable to Williams and Brown, and anyone to whom Brown may transfer, provided William Jones does not pay it. Another party may accept for the honor of William Jones, the drawee, if he sees fit. The party then becomes liable to Samuel

Jones. Again, Douglas may accept for the honor of any one of the parties, for $250 only. His liability then is only that amount.

How made. Such an acceptance must be in writing, and must indicate that it is an acceptance for honor, and it must be signed by the acceptor for honor. (Sec. 281.) The usual forms are as follows:

Accepted Supra Protest,
For honor of A. B.
JAMES ROBINSON.

or

Accepted S. P.,
JAMES ROBINSON.

As stated, the acceptor for honor is liable to all parties subsequent to the party for whose honor he accepts, and the holder. (Sec. 283.) The engagement he enters into is, that he will, on due presentment, pay the draft according to the terms of his acceptance, provided it shall not have been paid by the drawee; and provided, also, that it shall have been duly presented for payment and protested for non-payment, and notice of dishonor given to him. (Sec. 284.)

WHAT DRAFTS MUST BE PRESENTED FOR ACCEPTANCE

(1) Where the draft or bill is payable *after* sight, or in any other case where presentment for acceptance is neccessary to fix the maturity of the instrument. (Sec. 240.) A. draws a draft on B., payable to C. "three months after sight." It is not possible to say when the draft is due until it has been seen and accepted by B. Drafts payable "*at* sight" were formerly among those which must be presented for

acceptance. This was owing to the days of grace, a draft payable "at sight" not being due until three days after acceptance. But days of grace have been abolished, and a draft payable "at sight" is now practically like a demand note or a check, and needs no presentment for acceptance.

While a draft made payable at a day certain need not necessarily be presented for acceptance as between the holder, or drawer, or indorsers, an agent for collection (as where a bank receives such a draft for collection) must use due diligence in presenting the draft for acceptance without delay, or he will be liable to his principal for damage resulting from his negligence. This is a step a prudent man of business would take for his protection—*i.e.*, to immediately bind the drawee as an acceptor; and an agent who neglects to do this is personally liable.

(2) Where the draft expressly stipulates that it shall be presented for acceptance. (Sec. 240.) Such a stipulation becomes a part of the contract contained in the draft, and of course must be carried out in order to hold the parties.

(3) Where the draft is drawn payable elsewhere than at the residence or place of business of the drawee. Such an instrument might well be the following:

NEW YORK, October 1, 1900.

Sixty days after date pay to the order of A. B., the sum of Four Hundred Dollars, at the

North American Trust Company, 141 Broadway.

WILLIAM JONES.

To J. S.,

30 Broad Street.

In such a case, J. S. is entitled to know that such a draft has been drawn on him. Unless presented for acceptance, he is not likely to know; and failure to meet the draft at maturity ***would in no way bind him*** unless presentment had been made.

Failure to present. The holder of a draft or bill which is required to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. Failure to do either one or the other will discharge the drawer and all indorsers. (Sec. 241.) What is a reasonable time will be discussed later.

How made. (Sec. 242.) Presentment for acceptance must be made by the holder or his authorized agent at a reasonable hour on a business day, and before the bill is overdue, to the drawee or his duly authorized agent. By a reasonable hour is meant, if presented at the place of business, between the hours which custom has defined as business hours; if at the residence, within the hours of rising and retiring. A business day is any day which is not a legal holiday or Sunday. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day. (Sec. 243.)

It is said that a duly authorized agent may

accept for his principal. It is within the power of the holder to demand of the agent clear and explicit authority from the principal to accept in his name; and, if it is not forthcoming, to treat the instrument as dishonored.

Two or more drawees. Where a draft or bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only. (Sec. 242, Sub. 1.)

Where the drawee is dead. Where the drawee is dead, presentment *may* be made to his personal representatives; but such presentment is not necessary, as under such circumstances the presentment is excused. (Sec. 242, Sub. 2.)

Drawee a bankrupt. In such a case, or where the drawee becomes insolvent or makes an assignment, presentment may be made to the bankrupt or to his trustee or assignee. (Sec. 242, Sub. 3.)

When presentment is excused. Where the holder of a bill or draft drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by the presentment is excused, and neither the drawers nor the indorsers are discharged. (Sec. 244.) But presentment is ex-

cused, and a bill may be treated as dishonored by non-acceptance:

(1) Where the drawee is dead, or has absconded, or is a fictitious person, or a person not having capacity to contract by bill;

(2) Where, after the exercise of reasonable diligence, presentment can not be made;

(3) Where, although presentment has been irregular, acceptance has been refused on some other ground. (Sec. 245.)

Where acceptance is refused, or can not be obtained, or where acceptance is excused and the bill is not accepted, the bill or draft is dishonored. (Sec. 246.) Under such circumstances, the holder must treat the instrument as dishonored, and duly protest it for non-acceptance, or he will lose the right of recourse against the drawers and indorsers. (Sec. 247.) And when a bill or draft is dishonored by non-acceptance, an immediate right of action against the drawers and indorsers arises, and no presentment for payment is necessary. (Sec. 248.)

PART VIII

Presentment for Payment

(a) Rules governing maturity.

1. It is important to ascertain the rules governing the maturing of commercial paper, since the question of the exact time that a bill or note falls due may arise in considering whether it was transferred before or after maturity; whether it has been presented, payment demanded, and notice of dishonor given in due time; and whether an action upon it is brought prematurely or is barred by lapse of time.

2. *Months.* Months in bills or notes are calendar months, and are computed from the day of the month the bill is dated (or accepted in case of bills payable after sight) to the corresponding day of the month of maturity; or if there is no corresponding day in the latter month, to the last day of that month.

Notes without grace.

(a) Note dated May 31, 1896, at one month, due June 30, 1896.

(b) Notes dated February 29, 1896, at twelve months, due February 28, 1897.

For example, in Roelmer *vs.* Knickerbocker L. I. Co., 63 N. Y., 160, the instrument was as follows:

NEW YORK, December 11, 1869.

$120.84.

Four months after date, without grace, I promise to pay to the order of the Knickerbocker Life Insurance Co. $120.84, with interest. JOHN ROELMER.

on which the comment of the court was:

Folger, C. J., 163: "The note which the insured gave was due and payable on the 11th day of April, 1870. In computing the time when a note, payable at a certain number of months after date, will become due, the rule is to exclude the day of the date from the calculation, and include the day of payment, when no days of grace are allowed. When a promissory note is dated on a day of any month, and made payable a specified number of months after that date, without days of grace, it accrues due and payable on the same day, in the stipulated number of months afterward, with the day of the date of the note."

3. *February.* The month of February is reckoned commercially as having twenty-eight days, although in the particular year in question it may have been twenty-nine. Thus, a note made on February 3, 1860, payable one hundred and twenty days after date, with grace, will fall due on June 6, the extra day in February not being taken into account. So, a note dated December 31, 1812, payable ninety days after date, without grace, falls due on March 31, 1813, there being no extra day in February of that year.

4. ***Sunday or holiday.*** Paper without grace.

"In the very uncommon case of paper in which grace is excluded by the terms of the very paper—the paper not being payable on demand—payment is due, in other words, it matures, as if it were an instrument of the common law instead of the law merchant. Thus, if the day of payment, reckoned literally, would fall on Sunday or any other non-secular day, it is due on the following day, and presentment should be made on that day, not before, not after. If two non-secular days should come together, the first being the one on which payment otherwise would be due, the paper does not reach maturity until after both these days have passed."

5. *Same.* Paper entitled to grace.

"This leaves us with the case of paper entitled to grace. In such cases the paper reaches its maturity three days after the time at which by its terms taken literally, it would be due; and presentment should be made on the last day of grace, not before, not after. If what would be the third day of grace should be Sunday or any other non-secular day, the paper matures on the second day, or on the first day of grace, if the day before is also a non-secular day. There, indeed, is said to be a survival of the old idea of ***grace;*** these days were at first, according to current statement, mere favor extended by the holder; and hence, as they could not then be required, the time can not now be increased. However that may

be, the law is clear and positive: grace is cut off and not increased by non-secular days at payment time."

6. ***Changed by statute.***

All days of grace are abolished. (Laws of New York, 1894, ch. 607.)

January 1, February 12 and 22, May 30, July 4, first Monday of September, December 25, any general election day, every Saturday after twelve o'clock noon (called a half holiday), and any day appointed by the governor or President as a day of thanksgiving, or fasting and prayer, or other religious observance, are public holidays; and for the purpose of presentment and protest of bills, notes, and checks are to be regarded as Sunday. Negotiable paper, otherwise presentable for acceptance or payment on any of the said days or on Sunday, shall be presented on the secular or business day next succeeding such holiday or Sunday; but in the case of the half holiday, it may be presented at or before twelve o'clock noon. For the purpose of protesting and holding liable any party to such negotiable paper unpaid before twelve o'clock noon on any Saturday, demand may be made, and notice of protest or dishonor given, on the next succeeding secular or business day. Whenever January 1, February 12 or 22, May 30, July 4, or December 25 shall fall on Sunday, the next Monday is a holiday, and negotiable paper otherwise presentable on said Monday must be presented on the next succeeding sec-

ular or business day. (Laws 1887, ch. 289, 461; Laws 1895, ch. 603.) Bills and notes, except those payable at sight or on demand, otherwise payable on any half holiday, are payable at holder's option either before 12 m. or on the next succeeding secular or business day. (Laws 1887, ch. 461.)

7. ***Maturity of draft payable after sight accepted for honor.*** Where a draft payable after sight is accepted for honor, its maturity is calculated from the date of the ***noting for*** non-acceptance, and not from the date of the acceptance for honor. (Sec. 285.)

(*b*) ***Presentment and demand.***

Presentment. "Presentment is the act of handing over the paper to the maker, drawee, or acceptor, or at least exhibiting it to him with a view to payment or acceptance, according to the case and the purpose."

Demand. "Demand is a request upon the party, at the same time, to accept or pay, according to the case or purpose." Bigelow, p. 81.

Presentment, why required. Says McKinley, J., in Musson *vs.* Lake, 4 How., 262 (1845): "The reasons why presentment should be made to the drawee are: First, that he may judge of the genuineness of the bill; secondly, of the right of the holder to receive the contents; and, thirdly, that he may obtain immediate possession of the bill upon paying the amount." For these reasons the instrument must be exhibited to the person from whom

payment is demanded, and when it is paid must be delivered up to the party paying it. (Sec. 134.) Presentment is also required in order to charge the drawer and indorsers. (Sec. 130.) Neither the drawer nor indorsers are liable until the instrument has been dishonored by the drawee or maker. This can not be known until the instrument is presented to them and payment refused.

Presentment not necessary to charge principal debtor. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument. If the instrument is payable at a special place, however, and the principal debtor is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. Thereafter he need only hold himself ready to pay upon demand. He can not, in such cases, avoid payment of the instrument; but by pleading this fact, he may avoid damages and costs, because of the failure to make such presentment.

When demand necessary.

(a) Instruments payable on demand. In such cases presentment must be made within a reasonable time after the issue of the instrument, except that in case of a draft, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. (Sec. 131.) The old rule upon the question was, that the holder was not chargeable for neglect for failure to make pre-

sentment within any particular time. This rule is now changed, and the above rule obtains.

(b) Instruments not payable on demand. Where instruments are not payable on demand, presentment must be made on the day they fall due. (Sec. 131.)

What constitutes a sufficient presentment. Presentment for payment, to be sufficient, must be made:

1. By the holder, or some person authorized to receive payment on his behalf. For this purpose an order instrument, properly indorsed, or a bearer instrument in the hands of any party, is considered sufficient evidence of that party's right to demand payment; and payment to such party is valid, and will discharge the instrument, unless the party paying knew such payee to have obtained the instrument wrongfully. An order instrument unindorsed ought never to be paid, unless the payor is satisfied that the party in possession is the true owner or agent. For this purpose, he has a right to demand satisfactory evidence to that effect. In the case of foreign drafts, they should be presented by a notary.

2. At a reasonable hour on a business day. What a reasonable hour is will appear later.

3. At a proper place as herein defined.

4. To the person primarily liable on the instrument; or, if he is absent or inaccessible, to any person found at the place where the presentment is made. (Sec. 132.)

Presentment, where? (Sec. 133.)

1. Addressed to, or made payable at, a given place, presentment at that place is essential.

2. Payable "at the banking house at Maidstone and at Ramsbottom's & Co. in London"—presentment at either place sufficient. Beeching *vs.* Gower, Holt's N. P., 313 (Ames, 329).

3. So notes "payable at any bank" in a given city may be presented at any bank in that place.

4. "Where payable at a particular place in which the maker has at maturity neither a place of business nor a place of residence, the holder will make due presentment by being present with the note anywhere within the limits of the place named."

5. If no place of payment is named, presentment should be either at place of business or at residence of the person to make payment.

6. Where no place of payment is specified, but the address of the person to make payment is given in the instrument, it is to be presented there.

7. In any other case, if presented to the person wherever he can be found, or if presented at his last known place of business or residence.

8. Note not made payable at a particular place. Before maturity, maker removes to another place within the State. *Held*, holder is bound to make presentment and demand there to charge indorser.

"I am inclined to think that where a note is not made payable at any particular place, and the maker has a known and permanent residence within the State, the holder is bound to make a demand at such residence in order to charge the indorser. Whoever takes such note is presumed to have made inquiry for the residence of the maker, in order to know where to demand payment, and to assume upon himself all the inconvenience of making such demand, and the risk of the maker's removing to any other place (within the State) before the note falls due." Anderson *vs.* Drake, 14 Johns, 114 (1817), (Ames, 334).

9. Note made and dated in New York, maker then resided in Florida, and had not changed his residence at maturity. *Held*, that demand must be made of maker in Florida in order to charge an indorser. Taylor *vs.* Snyder, 3 Denio, 145 (1846), (Ames. 338).

10. "Where the maker of a promissory note, within this State, removes therefrom, and continues to reside abroad until its maturity, the indorser may be charged without demand of such maker or presentment at his last place of residence within the State." Foster *vs.* Julian, 24 N. Y., 28 (1861).

Chicopee Bk. *vs.* Phila. Bk., 8 Wall, 64 I (1869).

Nelson, J. "In cases where the drawee accepts the bill generally, in order to charge the drawee or indorser, the holder must present the paper, when due, at his place of busi-

ness, if he has one; if not, at his dwelling or residence, and demand payment; if the money is not paid, give due notice to the prior parties. If he accepts the bill, payable at a particular place, it must be presented at that place and payment demanded. In these instances, as a general rule, the bill must be present when the demand is made, as in case of payment the acceptor is entitled to it as his voucher. When the bill is made payable at a particular bank, it has been held that the presence of the bill in the bank at maturity, with the fact that the acceptor had no funds there, or, if he had, were not to be applied to the payment of the paper, constitute a sufficient presentment and demand; and if the bill is the property of the bank, the presence of the paper there need not be proved, as the presumption of law is, that the paper was not in the bank, and the burden rests upon the defendant to show that the acceptor called to pay it.

"In the present case, it is argued that the bill was in the Chicopee Bank at the time of maturity, and, as the acceptors had no funds there, a sufficient presentment and demand were made, according to the law merchant. It is true, the bill was there physically, but within the sense of this law it was no more present at the bank than if it had been lost in the street by a messenger on his way from the postoffice to the bank, and had remained there at maturity."

Interest from time of demand or suit.

Larason *vs.* Lambert, 12 N. J., L. 283.

The chief justice (291): "The counsel of the plaintiffs in error draws an argument in favor of his position as to the time of the operation of the statute (of limitation) from the rule that interest on a note payable on demand is recoverable on from the demand in *pais*, or the commencement of the suit. The argument, however, is not sound. The contract on the part of the promissor is to pay the sum specified whenever the payee shall demand it. The promissor, then, can not said to be in neglect until a demand is made, and he can not be said to be in default until a demand is made, and he fulfills his stipulation to the letter if, when required, he pays the amount he has promised. He ought not, therefore, to be treated as in default, and charged with damages, or, what is the same thing, interest, at an earlier day. But the payee may demand when he pleases. While he omits to demand, he is deemed, in this respect, in *laches;* precisely as he is after a day of payment, when one is fixed; and hence the difference, the time is computed against him, although the interest does not accrue against his debtor."

Time of presentment. Presentment for payment to charge a drawee or indorser must be made upon the day the paper is due. Presentment either before or after maturity is a nullity. (Sec. 130.)

Hour of day. "When a bill or note is payable at a banking house, or other place, where it is well known that business is transacted only during certain hours of the day, the law presumes that the parties intend to conform to such established course of business, and requires that a demand should be made during those business hours. Parker *vs.* Gordon, 7 East, 385. The cases of Garnett *vs.* Woodcock, 1 Stark., 475, and of Henry *vs.* Lee, 2 Chitty, 124, may show an exception to this rule that when a person is found at such a place after business hours, authorized to give an answer, the demand will be good. . . . When the bill or note is not payable at a place where there are established business hours, a presentment may be made at any reasonable hour of the day. Leftley *vs.* Mills, 4 T. R., 174; Barclay *vs.* Bailey, 2 Camp., 527; Triggs *vs.* Newnham, 10 Moore, 249; Wilkins *vs.* Jadis, 2 Barn. & Adol., 188. What hour may be a reasonable one has come under consideration in those cases. In the first of them Mr. Justice Buller observes that 'to say that the demand should be postponed to midnight would be to establish a rule attended with mischievous consequences.' In the second, Lord Ellenborough said 'if the presentment had been during the hours of rest, it would have been altogether unavailing.' In the third this remark, among others, is quoted and approved by C. J. Best. In the fourth, Lord Tendered remarked that 'a presentment

at twelve o'clock at night, when a person has retired to rest, would be unreasonable.'" Danna *vs.* Sawyer, 22 Me., 244.

Excusable delay. (Sec. 141.)

1. Death of holder. "When the holder of a negotiable promissory note has died, and no executor nor administrator has been appointed and qualified to act at its maturity, the indorsers remain liable, and will continue to be liable, if presentment is made to the maker in a reasonable time after the due appointment and qualification of an executor or administrator, and notice of dishonor is reasonable if thereafter given to them. An administrator must be allowed a reasonable time to search for and examine the papers and evidences of property of the deceased, before he can be required to act in relation to any of them." White *vs.* Stoddard, 11 Gray, 258 (1858).

2. War. "The existence at maturity of war between the countries or States in which the holder and payor respectfully reside would be another legal obstacle; and withholding presentment or attempts to make presentment until the end of the war would affect the liability of the indorsers . . . but within a reasonable time after the end of the war, presentment should be made on pain of discharging indorsers."

3. Epidemic resulting in quarantine of place of payment.

4. Where the holder is too ill to make pre-

sentment himself or appoint an agent to act in his behalf.

5. Where the mail miscarries.

To whom presentment should be made.

1. If there are several drawees or makers, not being partners, presentment for payment must be made to all of them. (Sec. 138.)

2. But a presentment to any one of the several drawees or makers, being partners when the bill or note is drawn, is sufficient, whether made before or after the dissolution of partnership. (Sec. 137.)

3. Death of drawee or maker. If a bill or note is payable generally, and the maker or drawee is not living at the maturity of the paper, presentment should be made to his executor or administrator. If there is no personal representative, presentment should be made at the former residence or place of business of the deceased. (Sec. 136.)

When presentment is not required to charge drawer and indorsers. Presentment for payment is not required in order to charge the drawer when he has no right to expect or require that the drawee or acceptor will pay the instrument. (Sec. 139.) This does not mean that it is necessary for the drawer to have funds actually in the drawee's hands. It is enough if he has a reasonable expectation that the draft will be paid. The same rule applies to indorsers. Where the indorser has no reason to expect that the instrument will be paid if presented, or where the instrument

was made or accepted for his accommodation, presentment for payment is not necessary in order to charge him. (Sec. 140.)

Where presentment may be dispensed with. (Sec. 142.)

1. Where, after reasonable diligence, presentment can not be made. Diligence requires the fulfillment of all the above rules as to time and place, however.

2. Where the drawee is a fictitious person.

3. Where the parties liable have waived presentment. The waiver may be either oral or written. Any understanding between the parties which is of a character to imply a waiver will be sufficient.

In the case of paper payable at a bank the law permits an equivalent to what is naturally meant by presentment; the fact that the paper is in the bank at maturity, to the knowledge of the bank, satisfies the law so far as presentment is concerned where the paper is on its face payable at such bank. Where so payable it is equivalent to an order to the bank to pay the same, and charge it to the account of the principal debtor thereon. (Sec. 147.)

Reasonable time. Under "Bona Fide Holder" we learned that where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. (Sec. 92.) So, too, in the above statement as to presentment of instruments payable on demand, they must be presented

within a reasonable time after issue. (Sec. 131.) What is or is not a reasonable time is difficult to determine. The law says that in determining it "regard is to be had to the nature of the instrument, the usage of the trade or business with respect to such instruments, and the facts of the particular case." The latter clause expresses it as best it can be expressed. The question will depend in every case upon the facts of that case. From one day to a month have been held reasonable, depending upon the facts in each case. Usage of trade or custom will usually guide. By some it has been held to be a question for a jury, by others a question for the court. Better opinion would seem to be that it is a question the determination of which both jury and court must take part in solving. The best advice upon the subject is to act promptly in all matters touching negotiable instruments, both as to negotiating them and in presenting them for acceptance or payment.

PART IX

Notice of Dishonor

As heretofore pointed out, the law construes the contract of the drawer or the indorser of a draft or note as a distinct promise to every subsequent party who takes the instrument to pay the instrument if the acceptor does not. They are not bound to pay until the instrument has been dishonored. When a draft or note has been presented for payment to the acceptor or maker, and demand for the payment made, and it is refused for any reason whatsoever, the instrument is ***dishonored.*** (Sec. 143.) This is true, also, where presentment is excused, and the instrument is overdue and unpaid. (Sec. 143.) See, also, when presentment is excused, in Part VIII.

When an instrument has been thus dishonored by non-payment by the parties primarily liable, the parties secondarily liable (drawer and indorsers) become immediately liable thereon, and must pay it, provided they have been duly notified of such dishonor. (Sec. 144.)

Notice of ***dishonor.*** Notice of dishonor, then, is taking the necessary steps to notify the drawer or the indorser of an instrument that such instrument has not been accepted, or has not been paid, and the party notified

is expected to pay it. This notice may be either oral or in writing. (Sec. 167.)

What the notice must contain. There are three formal requisites which a valid notice of dishonor should contain: (1) A description of the dishonored bill or note which will fairly identify it to the mind of the party notified; (2) a statement that it was dishonored; (3) if the notice is written, it ought to contain the name of the party who gives the notice, or the name of the party by whose authority it is given; if oral, this fact ought to be contained in the statement made to the party notified. No particular form is necessary, however, so long as it contains these requirements. (Sec. 167.) Accordingly, a notice that a bill is due and unpaid is sufficient, without formally stating that it was presented for payment. It need not inform the party to be charged that he is looked to for payment; nor need it state where the instrument is—*i.e.*, in whose hands; nor need it be accompanied by a copy of protest. If written, the notice need not be signed, and an insufficient written notice may be supplemented and validated by an oral communication. A misdescription of the instrument does not vitiate the notice, unless the party to whom the notice is given is misled thereby. (Sec. 166.)

Who may give notice. Notice may be given by the holder or by any prior holder or party to the instrument who may be legally liable

to take up the instrument, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. (Sec. 161.)

For instance: A. is the maker, B. the payee, C., D., E., and F. indorsers in their respective order, and G. holder. Upon the instrument's being presented to A. for payment, and dishonored, G., the holder, may give notice to F., and F. may give notice to E., and so on. It is usual for the party giving notice to notify all the parties, but it is not necessary, unless he wishes to hold them. On the other hand, C. may notify B., the payee, as he may become liable, as above stated. If he does notify B., then his notification inures to the benefit of D., E., F., and G., and none of these need notify. And this is true, even though C. had not taken up the note. In the language of the statute: "Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder, and all parties subsequent (who follow) to the party to whom notice is given." (Sec. 164.) So, too, in the illustration given, if G., the holder, notifies B., the payee, C., D., E., and F. need not notify B., because the notice by the holder inures for the benefit of all subsequent holders, and all prior parties who have a right of recourse against the party to whom it is given. (Sec. 163.)

Notice by an agent. Notice of dishonor may be given by a duly authorized agent of any

party who might himself give notice. The agent may give this either in his own name or in the name of any of the parties entitled to give notice, whether that party be his principal or not. (Sec. 162.) This is commonly done by banks acting as agents for collection. Where the instrument has been dishonored in the hands of an agent, he (the agent) may give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder. (Sec. 165.) Notice by a party who can not legally be called upon to take up the bill or note, or a drawee, or a maker, or a mere stranger, is a nullity.

To whom notice should be given. Generally, when an instrument has been dishonored by non-acceptance or non-payment, notice must be given to the drawer and to each indorser; and any drawer or indorser to whom such notice is not given is discharged. (Sec. 160.) Note the statement before made that the parties primarily liable—*i.e.*, the acceptor of a draft, and the maker of a note—are liable, whether notice is sent to them or not.

Agent. Notice may be given to the agent of the party to be charged if the receipt of such notice is within the authority of the agent. (Sec. 168.)

Joint drawers or indorsers. Notice to joint parties who are not partners must be given to each of them unless one of them has authority to receive such notice for the others. (Sec. 171.)

Partners. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. (Sec. 170.)

Executors. A notice to any one of the executors of a drawer or indorser is sufficient; but if several executors jointly draw an instrument, or indorse one payable to them, notice must be given to all of them.

Bankrupt. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice must be given either to the party himself or to his trustee or assignee. (Sec. 172.)

Where drawer or indorser is dead. Where any party is dead, and his death is unknown to the party notifying, a notice duly sent to him as if living is sufficient; but if known to be dead, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased. (Sec. 169.) If the deceased left a will, and it is necessary to send notice before the party named in the will has had time to qualify as executor, notice

may be sent either to this party as executor, or to the last place of business or residence of the deceased. But if the deceased left no will, and an administrator is appointed, he must have qualified before notice can be sent to him.

Time within which notice must be sent. Notice may be given as soon as the instrument is dishonored; and unless delay is excused, must be made in the following manner: (Sec. 173-174.)

Where the parties reside in the same place. Where the person giving and the person to receive notice reside in the same place, notice must be given as follows:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following. While both of these rules are positive, a notice delivered at an unseasonable hour will be sufficient, if actually received by the party to be charged on the proper day.

3. If sent by mail, it must be deposited in the postoffice in time to reach him in usual course on the day following.

Where notice of dishonor is duly addressed and deposited in the postoffice, the sender has complied with the requirement, notwithstanding any miscarriage in the mails. (Sec. 176.) So, notice deposited in any branch post-

office, or in any letter-box under the control of the postoffice department, is sufficient. (Sec. 177.)

Where parties reside in different places. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor; or, if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail if it had been deposited in the postoffice within the time specified. (Sec. 175.) If there is no mail communication, the transmission must be as rapid as is practicable by the ordinary modes of conveyance.

Holidays. If the next day is a holiday, it is entirely excluded in determining the proper day for giving notice. So, too, if the party receives notice on a holiday, he is considered as receiving it the next business day.

Notice to subsequent party, time of. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. (Sec. 178.) This means nothing more nor less than that

each indorsee or transferee has one day for giving notice.

"As each indorsee or transferee is entitled to his day, according to the rules just stated, and as a due notice given by any party competent to give notice inures to the benefit of all the parties to the instrument, it follows that the time within which a party can be charged by a notice given to him may be greatly extended. If there were fifteen indorsers of an instrument, and each indorser should duly notify only his immediate indorser, the time within which the first indorsee might be charged would be measured by the time required for the due forwarding of the fifteen successive notices; whereas, if the fifteenth indorsee should give direct notice to the first indorser, the time within which the latter could be charged would expire with the next day after the day of dishonor." Ames, 847.

Where notice must be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters. (Sec. 179, Sub. 1.) The address must not be too general. For instance, a notice sent to "Mr. Brown, Albany, N. Y.," is insufficient. So, too, an indorsement as follows: William Jones, 31 West Nineteenth street, New York City.

Notice sent to "Mr. William Jones, New York City," is not enough, and the indorser is discharged. But if the party to be charged has added to his signature the name of a place, it is enough, in addressing the notice, to send notice according to the name and address given.

2. If he lives in one place, and has his place of business in another, notice may be sent to either place. (Sec. 179, Sub. 2.)

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning. (Sec. 179, Sub. 3.)

Where the notice is actually received by the party within the time specified, it will be sufficient, though not sent as required in the above statements.

Of course, personal notice may be given wherever the party may be found. To illustrate Sec. 3, if the party has his office and domicile in New York City, and is in Albany attending the Legislature, a notice addressed to him at the Capitol at Albany would be sufficient, provided the Legislature was in session.

If notice is sent by mail, and the party to be notified resides in a town where there are two or more postoffices, and it is known that he receives his mail at one particular office, the notice will be insufficient unless sent to that office.

Where an instrument has been transferred, and the transferee changes his address after having transferred the instrument and with-

out the knowledge of the party notifying, notice sent to the former place of residence or business is sufficient.

When notice is dispensed with. If the party notifying is ignorant of the place of residence or business of the party to be charged, he must make all reasonable efforts to find him; and if, after the exercise of reasonable diligence, he can not find him, notice of dishonor is dispensed with. (Sec. 183.)

Reasonable diligence, like reasonable time, will depend upon the circumstances in each case. What is sufficient in one case might not be sufficient in another. In a comparatively late case in New York, it was held that relying upon a directory was not sufficient diligence, because "the sources of error in that process are too many and too great."

Service by delivery. Service by delivery is always permissible, and when the ordinary mail service is suspended, must be so made if practicable. It must be made, however, as expeditiously as it would be by mail, and the expense must be borne by the party sending. A delivery to the person, wherever found, is good. So, too, if left at his residence or place of business. But if left with an employee, while the defendant is away, and instructions are given the employee not to open it until the return of his employer, it is not good.

Delay, when excused. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of

the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. (Sec. 184.) Such an instance might be a state of war, or the prevalence of a malignant disease. This is true, too, where the party is ignorant of the residence or place of business of the party to be charged, provided due diligence is used to find this out. Under such circumstances, a delay is excused, but notice must be sent immediately after these facts are ascertained.

Non-acceptance, etc. Where due notice of dishonor by non-acceptance has been given, it is enough, and notice of dishonor by non-payment is unnecessary, unless in the meantime the instrument has been accepted. (Sec. 187.)

An omission to give notice of dishonor by non-acceptance will not prejudice the rights of a holder in due course who becomes such subsequent to the omission. In such a case, the holder may duly notify of dishonor by non-payment. (Sec. 188.)

Waiver of notice. Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied. (Sec. 180.) But satisfactory proof must be given of this, otherwise it will not be presumed. For instance, if an indorser agrees to continue his liability, or to be responsible either before or after the time for

giving notice, he waives all right of notice, and stands in the same position as if he had been duly notified. This agreement may be expressly stated in the instrument above his indorsement, or his language may be such as to imply it, but the proof must be satisfactory, or he can not be held to have waived his rights. If the waiver is in express words in the body of the instrument, all parties will be bound by it; but where written above the signature of an indorser, it will bind him only. (Sec. 181.)

Waiver of protest. It is quite common for an instrument to be indorsed, "Protest waived." Such a waiver of protest will also be a waiver of presentment and notice of dishonor. (Sec. 182.)

When notice need not be given to drawer. Notice of dishonor is not required to be given to the drawer in either of the following cases: (Sec. 185.)

1. Where the drawer and drawee are the same person, because the drawee is the party who has refused payment.

2. Where the drawer is a fictitious person, or a person not having capacity to contract, as an infant, an insane person, etc.

3. Where the drawer is the person to whom the instrument is presented for payment. In such a case, he has already refused, and that is notice to him.

4. When the drawer has no right to expect or require the drawee or acceptor to honor the

instrument, as where he has fraudulently drawn the instrument, or has no funds in the hands of the drawee, and did not expect to have, etc.

5. Where the drawer has countermanded payment.

When notice need not be given to the indorser. (Sec. 186.)

1. Where the drawee is a fictitious person, or a person not having capacity to contract, and the indorser knew this fact when he indorsed.

2. Where the indorser is the person to whom the instrument is presented for payment.

3. Where the instrument was made or accepted for his accommodation.

The language of the statute, here given in effect, is so plain that no comment is necessary in order to explain it.

PART X

Protest

Where any negotiable instrument has been dishonored, it may be protested for non-acceptance or non-payment, as the case may be. (Sec. 189.)

The word "protest" means to formally publish or testify. "In a popular sense, it includes all the steps taken to fix the liability of a drawer or indorser upon the dishonor of the instrument to which he is a party. More accurately speaking, it is the solemn declaration on the part of the holder against any loss to be sustained by him by reason of the non-acceptance or non-payment, as the case may be, of the instrument in question; and a calling of the notary to witness that due steps have been taken to prevent it." 2 Daniel, p. 4.

What instruments must be protested. Foreign bills or drafts must be protested when dishonored. For this purpose, the States of the Union are considered as foreign to one another. Inland bills or drafts and promissory notes need not be protested. "Where a foreign draft or bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance; and where such a bill or draft. which has not been

previously dishonored by non-acceptance, is dishonored by non-payment, it must be duly protested for non-payment. *If it is not so protested, the drawer and indorsers are discharged.* Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is necessary." (Sec. 260.)

Note that we stated that *any* negotiable instrument *may* be protested if so desired, but that it is not necessary, save in the case of foreign bills or drafts. It is customary to protest foreign checks and foreign promissory notes, unless protest is waived, which can be done by indorsing upon the instrument, or on a slip of paper attached to the check or note, "Protest waived."

What the protest must contain. The protest must be annexed to the bill or draft, or must contain a copy thereof; and must be under the hand and seal of the notary making it; and must specify:

(1) The time and place of presentment.

(2) The fact that presentment was made, and the manner thereof.

(3) The cause, or reason, for protesting the bill.

(4) The demand made, and the answer given, if any, or the fact that the drawer or acceptor could not be found. (Sec. 261.)

The old rule that the protest need contain only a fair description of the bill or draft, would seem to be done away with by the rule which requires the protest to be annexed to,

or to contain a copy of, the bill or draft. No particular form is necessary, provided the protest contains these facts. Notaries generally have printed forms which are used.

Who should make the protest. The protest should be made, or drawn up, by a notary public personally. If there be no notary public in the place, "any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses." (Sec. 262.) The notary may be an officer in the bank where the protest is made, and even a stockholder therein.

When the protest should be made. When a bill or draft is protested, such protest must be made on the day of its dishonor, unless delay is excused. When a bill has been duly noted—*i.e.*, the fact that that bill was dishonored, and that a protest is necessary, "the protest may be subsequently extended as of the day of noting." For instance: The X Bank presents a draft to B., the acceptor, for payment, on October 1, 1900, and payment is refused because of lack of funds. The bank immediately places the draft before its notary, with instructions to note its dishonor and protest it. The notary makes such an entry on his books, and the protest, though actually completed the day before the trial, may be dated as of the day the notation was made.

Where the protest should be made. A bill or draft must be protested at the place where it is dishonored. There is an exception to

this when a bill or draft drawn payable at the place of business of some person other than the drawee has been dishonored by non-acceptance; it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary. (Sec. 264.)

As stated before, a bill which has been protested for non-acceptance may be subsequently protested for non-payment. (Sec. 265.) This is not necessary, however, unless in the meantime the bill has been accepted.

Protest before maturity. Where the acceptor has been adjudged a bankrupt, or an insolvent, or has made an assignment for the benefit of creditors; before the bill or draft matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. (Sec. 266.)

When protest is dispensed with. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. (See page 146.) Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. (See page 143 as to what circumstances will excuse delay in giving notice of dishonor.) When the cause for delay ceases to operate, the bill must be noted or protested with reasonable diligence. (Sec. 267.)

Loss of the instrument. Where a bill is lost

or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. (Sec. 268.) Loss of the instrument, however, will not excuse demand and protest. The written particulars should contain a description of the instrument, which will be sufficiently clear for the parties to identify it.

Dishonor of bill by acceptor for honor. When a bill has been accepted for the honor of any party, and the acceptor for honor refuses to pay it, it must be protested for non-payment by him. (Sec. 289.) On the other hand, where a previously dishonored bill has been accepted for honor supra protest, etc., it *must* be protested for non-payment by the party primarily liable before it can be presented for payment to the acceptor for honor. (Sec. 286.)

PART XI

Discharge and Extinguishment of Negotiable Instruments

When the title to a note or draft is once vested in the payee, nothing short of destruction, retransfer to the acceptor or maker, its cancellation, or an alteration of the instrument, can extinguish the instrument; and its discharge can only be brought about by payment, or by operation of law, or by agreement of the parties. By "discharge" of an instrument is meant that all rights of action upon it are taken away. A negotiable instrument is discharged:

(1) "By payment in due course by or on behalf of the principal debtor." (Sec. 200, Sub. 1.) Payment in due course of an instrument is made when it is made at or after maturity to the holder thereof, in good faith, and without notice that his (the holder's) title is defective. (Sec. 148.)

(2) "By payment in due course by the party accommodated where the instrument is made or accepted for accommodation." (Sec. 200, Sub. 2.)

Payment may be made by any of the parties to a bill or note, and such payment is presumed to be a discharge of his own liabilities, and the rights and liabilities of all

parties who are subsequent to him. So far as the rights of the party paying, if he be any other than the party primarily liable—as indorser or drawer—he is regarded as a purchaser as to the parties prior to him, and he has his right of action on the instrument as against any and all parties prior to him. (Sec. 202.) For instance: A. drawer, B. acceptor, C. payee, D., E., and F. indorsers. D. pays the instrument. The rights and liabilities of E. and F. are extinguished, as well as any liability which D. may have; but D. may be regarded as a purchaser of the instrument, and his rights may be asserted against any or all of the parties prior to him. The indorser D. may reissue the instrument if he desires, by striking out his own indorsement and those of E. and F. This is true in every case where a party secondarily liable pays the instrument, except in the case where the instrument is payable to the order of a third person, and has been paid by the drawer; and where made or accepted for accommodation, and has been paid by the party accommodated. (Sec. 202.)

(3) By the intentional cancellation of the instrument by the holder. (Sec. 200, Sub. 3.) If an instrument is intentionally destroyed by the holder, he forfeits all rights against every party to it. If the destruction is unintentional, or accidental, he loses all right to recover at law, but may still recover in equity, unless statute gives him the right to proceed as if

the instrument still existed. An intentional cancellation is equivalent to the destruction of the instrument. Just what a sufficient cancellation is would be difficult to state, depending, as it does, upon the circumstances of the case. The following cases, already noted, are submitted as illustrations of cancellation:

(a) A. gives his note to B. B. tries to have it discounted, but fails, and returns it to A. A. takes it from B., and tears it up in B.'s presence, and drops it upon the floor. While A.'s back is turned, B. picks up the pieces, pastes them together, and afterward has the note discounted. A. intended to destroy and cancel, and the act was sufficient to show it.

(b) A. accepts a blank bill of exchange, and gives it to B., who is to fill it out as drawer. B. finds the occasion for drawing it has passed, and returns it to A. A. places it on his desk, and while absent from his desk, a porter takes it, fills in names and amount, and gets it cashed. Held, that A. never intended to put the instrument in circulation after its return by B., and therefore he could not be held liable upon it.

(4) "By any other act which will discharge a simple contract for the payment of money." (Sec. 200, Sub. 4.) This would include discharge by agreement of the parties, and by alteration of the terms of the contract. Agreement needs no further comment, and Alteration will be taken up later on.

(5) "When the principal debtor becomes

the holder of the instrument at or after maturity in his own right." (Sec. 200, Sub. 5.) This means a retransfer in such a way that the party who accepted or made the instrument becomes owner of it again. If he becomes owner of it before it matures, then he may retransfer it again if he desires; but not so at maturity or thereafter. For instance: A. maker of a note, B. payee; B. indorses to C., C. indorses to D., and D. indorses and transfers it to A. If the instrument is not yet due, A. can indorse again (if necessary), and retransfer it to E. If it is due or overdue, the retransfer to A. will discharge it.

Parties who are secondarily liable—as drawer of a bill and indorsers—are discharged: (Sec. 201.)

(1) By any act heretofore enumerated which discharges the instrument, or

(2) By the intentional cancellation of his (the indorser's) signature by the holder. As: C., D., and E. may be the indorsers of a note; F., the holder, may choose to hold only C., and cross out the indorsement of D. and E.; if he does so, he thereby discharges D. and E. from liability.

(3) By the discharge of a prior party. If the holder discharges the maker of a note or the acceptor of a draft, he discharges the drawer and indorsers thereby. So one who discharges a prior indorser discharges all parties between the one discharged and himself. "The contracts of the parties are said

to be like the links of a pendant chain: if the holder dissolve the first, every link falls with it."

(4) By a valid tender of payment made by a prior party. A. is the maker, C. the indorser and surety, and D. the holder of a promissory note. A. tenders payment to D., who refuses it. C. is discharged by this tender of payment.

(5) If the principal is released, this will discharge any indorser, unless the holder reserves the right to hold the indorsers. This right must be expressly reserved. For instance: The A. B. Company makes a promissory note, which is indorsed by G. The A. B. Company fails, and while in liquidation and before the maturity of the note, X., the holder, agrees to release the A. B. Company upon representations from the reorganizers that they will satisfy the note. Unless X. expressly reserves the right to hold G., his release of the A. B. Company will discharge G.

(6) Any agreement between the holder and any prior parties whereby the holder agrees to extend the time of payment, will discharge the indorser of a note, or the drawer of a draft, unless this right to hold them be expressly reserved. In the above illustration, if X. had extended the time for payment by the A. B. Company, G. would have been discharged, unless X. had expressly reserved the right to hold G.

As stated before, the holder may renounce his rights against and thereby relieve any party to the instrument, and this at or after the maturity of the instrument. If he renounces his rights against the principal debtor, at or after maturity, the instrument is discharged. This renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. (Sec. 203.) A. is maker of a promissory note for $175, B. is the payee, C. an indorser, and D. the holder. D. receives $125 from A., and gives A. a receipt "in full settlement of all accounts to date," and the note. D. later tries to hold C. for the balance of $50. His act discharged the instrument, and C. is not liable.

Alteration. Under liabilities of parties, we have already stated that where a negotiable instrument is materially altered without the assent of all parties liable thereon, it will discharge all parties except the party who has himself made, authorized, or assented to the alteration; and, of course, any parties who took it from him.

The old rule was, that all parties prior to the party who made the alteration were discharged absolutely, because it was a material change of their contract, to which they did not assent. The later rule seems to be that, even if an instrument has been altered, and it is in the hands of a holder in due course, it may be enforced against the original parties according to its original tenor. Jones makes

a promissory note for $75 to Williams. Williams transfers it to Smith, and Smith transfers it to Brown. Brown raises the amount to $175, and transfers it to Doe, who in turn transfers it to Roe. Roe may, under the new rule, hold Jones, Williams, and Smith on the original amount of $75, while he may hold Brown and Doe for $175.

A material alteration may be made in any of the following:

(1) The date.

(2) Sum payable, either principal or interest.

(3) Time or place of payment.

(4) The number or relation of the parties.

(5) The medium of currency in which payment is to be made.

(6) Adding a place of payment where no place of payment is specified.

(7) Any other change or addition which alters the effect of the instrument in any respect.

PART XII

Checks, Bonds, Etc.

We have previously stated that there is no difference between a check and a demand bill of exchange, save that the check is in the form of a bill drawn on a bank; and that the rules which apply to one will apply to the other, with few exceptions. This is true, and the rules we have set forth in the matter of essential characteristics, indorsement, liability of parties, notice of dishonor, protest, etc., apply with equal force to checks as to other negotiable instruments. We shall point out these various exceptions, and outline the rules applying to checks which differ in any way from the rules heretofore laid down for notes and drafts.

There is one difference that is generally accepted by the courts as being true of checks which is not even true of demand bills of exchange. That difference is summed up in the statement that checks *purport* to be drawn on a deposit in the custody of the bank. In other words, it is taken for granted that no one will draw a check on a bank unless he has deposited money in the bank, or has a credit there. Like demand bills, checks are not presented for acceptance, but only for pay-

ment; and they are payable immediately upon presentment.

Essential Characteristics. The same essential parts are required in a check as in a bill of exchange. The date, payee, drawer, amount, etc., are all required, and the same rules apply.

We have seen that a bill or note may be either ante-dated or post-dated. So a check, ante-dated, does not lose its character as a check; but the weight of authority holds that a post-dated check (one payable at a future day) is a bill of exchange.

Presentment. The rule has already been stated that a check, like a bill, must be presented for payment within a reasonable time after its issue; and due diligence must be shown in this particular, otherwise the drawer and indorsers are discharged. Nevertheless, the legal consequences of neglect to present a check within a reasonable time differ from those which follow from failure to present a bill within a reasonable time. In the case of a check, the drawer is not discharged by the delay or negligence in presentment unless he has suffered thereby. In the language of the statute, "a check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." (Sec. 322.)

For instance, January 5, 1900, Jones draws a check on the First National Bank for $525

in favor of Williams. Williams does not present it to the bank until May 1, 1900. In the meantime the bank has failed, and its assets will allow the payment of only sixty per cent. of the amount owed to depositors. Under the rule above stated, Jones would be discharged from forty per cent. of the amount of the check by reason of the delay. At the trial it would be necessary for Williams to show that Jones has not suffered loss in order to protect himself.

The *indorser* is in a different position, however, because, unless a check is presented within a reasonable time, and notice of dishonor given, the indorser is absolutely discharged, whether he has suffered injury or not.

When Presentment and Notice are Excused. If presentment will be of no benefit to the drawer, as where there are no funds, failure to present will be excused. If the drawer has no funds in the hands of the drawee (bank), and has no reasonable grounds to expect the bank to honor his check, the making of the check is a fraud on the part of the drawer, and presentment is unnecessary. So, a knowledge of the suspension of the bank, notification of unwillingness to pay, accidental destruction of the check, will excuse failure to present the check for payment.

Partial Funds. A bank is under no obligations to make a partial payment; and if there is not sufficient money on deposit to pay a

certification, the bank represents that the signature of the drawer is genuine, that the drawer has funds in the bank sufficient to pay the check, that it will retain the said funds and pay them to the holder. The bank has knowledge of all this, and can not avoid its responsibility because of its own or its agents' carelessness. Under such circumstances, if the signature of the drawer is forged, the bank is liable. But the bank does not admit the genuineness of any indoresement. If a check is raised before presentation, and unknown to the bank, and the raised amount paid by the bank, the bank is liable unless it can be shown that the drawer has been negligent in filling up the check, leaving blank space, etc.

Position of the Parties. When a check is certified by a bank, the drawer is released, and the bank becomes liable, because by this process the bank assumes the liability previously held by the drawer. This is true when the indorser or holder has the check certified, but is not true when the drawer himself has his own check certified. Under such circumstances, the drawer is not discharged. The only effect of certification in such a case is to give the check additional strength by carrying with it evidence as to good faith, and sufficient funds to meet it when presented for payment.

Indorsers. Where the holder gets the check certified, all indorsers are discharged; but this is not true when the drawer himself has it certified.

Payment. Checks are to be paid in the order of their presentment. Priority as to time of drawing amounts to nothing so far as the bank is concerned. Where a bank by mistake pays a sum in excess of the amount of the check presented, it may recover from the person receiving the overpayment. But a payee is not responsible to a bank if, without fraud on his part, he has received the amount of a check, and it turns out there were no funds—or the bank had paid under mistake.

Liability of a Bank to a Depositor. The relation between a bank and a depositor is one of debtor and creditor. The bank agrees with the depositor that in consideration of the deposit it will pay all demands made by the drawer, upon being duly presented, and there being sufficient funds to meet the same. If the bank fails to do this, then the depositor has a right of action against the bank; and his measure of damages will generally be the loss he has sustained by such refusal. If he can show no actual loss, the cases seem to indicate that moderate damages will be granted. It is submitted that the contrary doctrine is the more equitable one, and that no actual damages should be allowed unless actual loss is shown.

The Bank and the Holder. The weight of authority is in favor of the position that the bank and the holder have nothing in common—in other words, the bank's contract is with the depositor, and not the holder. Under such

circumstances, the holder of a check has no cause of action against the bank for refusing to honor a check, unless the bank has previously certified or accepted the check for payment. A check (unless certified) does not operate as an assignment of any part of the funds of the drawer, and the bank is not liable to the holder. (Sec. 325.)

Forged Checks. The contract between the bank and the depositor is such that, if a bank pays out money on a forged check, the bank must bear the loss, and not the depositor, unless the forgery can be traced to the neglect or fault of the drawer. The bank is bound to know the signature of the depositor; and if it pays out money on a forged instrument in the hands of an innocent purchaser for value, it can not recover the money so paid, nor can it be charged to the depositor. The bank must bear the loss. In case a check is " raised," the bank can hold the drawer only for the original amount, unless negligence can be shown in the drawer.

Revocation. The drawer has the right to recall, or countermand, the payment of a check before it is paid; but he has no right to recall the check after it has been paid to one who took it in good faith and for value, nor can the bank do this for him.

Pass Book. The general rule seems to be that it is the duty of every depositor, when his pass book has been balanced and returned to him, to examine with due diligence the pass

book and vouchers, and report without unreasonable delay any errors which may be discovered in them. If he fails to do so, he can not afterward dispute the correctness of the pass book. This is important if money has been paid out on a forged check. There is good reason to state that this is not the law in all States, especially in New York, where no such duty seems to be thrust upon the depositor.

BONDS

A bond is an obligation in writing and under seal binding the obligor to pay a sum of money to the obligee. Many forms of bonds obtain in this country, but we are interested only in those which are common to the commercial world; and which, by the usage and custom of commerce, have come to be regarded as negotiable securities. This bond has received many names, and is, perhaps, best designated by the words *coupon bond.* Such a bond is an obligation in the nature of a promissory note, in which the obligors promise to pay a sum of money at a fixed time in the future, to which is attached certain other obligations called coupons, which call for the payment of the installments of interest on the principal debt as they fall due. These coupons are severed from the bond at the time the installment of interest which they represent becomes due; and, when so severed, pass as independent instruments.

Form. No certain form is necessary to con-

stitute a bond. The requisites as to time, money, parties, etc., are the same as those of all negotiable instruments. The text writers and the cases all agree in stating that a bond must be under seal and must be delivered, but no definite form for either the bond or coupon is required. They do not differ in any respect from a promissory note. They are usually signed by two or more of the executive officers of the corporation, and these signatures may be either written or printed. The coupon is sometimes in the form of a draft, or of a promissory note, or of a check, or it may be a mere due bill. These coupons need not be presented on the day of maturity in order to hold the corporation or individuals primarily liable. Presentment for payment at maturity is necessary only in case there is an indorser thereon.

Who May Execute. Later law is authority for the statement that bonds may be issued by anyone capable of making a contract. The old rule was that only corporations, public and private, could issue, and not individuals. This was due to the use of the seal, as under the old law merchant the instruments of individuals could not be sealed and still retain their characteristic negotiability.

Negotiability. As stated above, the old rule was to the effect that a seal attached to an instrument destroyed its negotiability. Modern commerce has demanded that these sealed instruments be treated as negotiable instruments,

and it is now the law generally in the United States that bonds are for every purpose as negotiable as any other instruments heretofore spoken of. In England only those bonds which are payable to bearer are regarded as negotiable, and these are not many in number. Bonds in which provision is made for registration are not regarded as negotiable under the English rule. In the United States this provision will not destroy the negotiable character of them unless they are actually registered. Registration is to afford greater security to the holder. If he desires, and the bonds provide for it, he may have them registered on the books of the company; and they are regarded as his bonds, in whosever hands they may be, unless the owner gives a properly signed order for transfer. It is useful in case of loss or destruction of the bond, but is not much in use to-day. Coupon bonds are generally made payable to bearer, and, when thus payable, are subject to the same rules of transfer, etc., as obtain in the case of drafts, notes, or checks.

BILLS OF EXCHANGE IN A SET

The simple draft or bill of exchange is the common form used throughout the United States. But in consequence of the inconvenience and delay that may be caused by the loss of foreign drafts or bills, it is the custom to issue several copies of the same draft or bill. These copies all constitute one draft or

bill, and are called a bill of exchange in a set. (Sec. 310.) There may be two, three, or even four copies. Later custom makes two, but three copies are not uncommon.

FORM

First £500	New York, Aug. 1, 1900. Exchange for London. Thirty days after sight of this First of Exchange (Second and Third unpaid) pay to the order of *Thomas Brown,* Five Hundred Pounds Sterling, value received, and charge the same to account of James Robinson. To Baring Bros. & Co., London, England.
Second £500	New York, Aug. 1, 1900. Exchange for London. Thirty days after sight of this Second of Exchange (First and Third unpaid) pay to the order of *Thomas Brown* Five Hundred Pounds Sterling, value received, and charge the same to account of James Robinson. To Baring Bros. & Co., London, England.

Third £500	New York, Aug. 1, 1900. Exchange for London. Thirty days after sight of this Third of Exchange (First and Second unpaid) pay to the order of *Thomas Brown* Five Hundred Pounds Sterling, value received, and charge the same to account of James Robinson. To Baring Bros. & Co., London, England.

It is usual to detach the first of exchange and send it by the earliest steamship. The second and third may be kept or sent by different steamships. In case of a loss of the first, the second may be used. Note the use of the words "after sight of this First of Exchange (Second and Third unpaid)." These words are for the protection of the drawer, and give notice to all purchasers of the connection between the several parts. If this were not done, the drawer might be held liable on more than one part of his transfer to innocent purchasers. Any one of the parts may be negotiated; and when it is accepted and paid, all the other parts are extinguished. (Sec. 315.) A purchaser of such a bill is in duty bound to inquire after the other parts which are missing; and if he purchases the bill without inquiry, he can not be called an

innocent purchaser, and would have to stand the loss, provided one of the parts had already been negotiated.

Acceptance. The acceptance may be written on any part, but it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different innocent holders, he is liable on every such part, as if it were a separate bill. (Sec. 313.)

Indorsement. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part; and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. (Sec. 312.)

Payment. Where the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of an innocent holder, he is liable to the holder thereon. (Sec. 314.)

As we have said, any part of the bill may be negotiated. The party entitled to the bill, be he holder or acceptor, should demand the delivery of all the parts to him; and he can compel their delivery to him if he desires. This is rarely done in business circles, however, unless it be that the second or third part is presented for acceptance or payment.

PART XIII

Honor

A. Acceptance for honor.

B. Payment for honor.

Acceptance and payment for honor are not in common use in the United States, though quite common in England and on the Continent. The new negotiable instruments law has made provision for such acceptances and payment, and while various statements as to both have been made throughout the previous parts of the work, it seems wise to introduce hereunder a concise statement of the entire subject of honor.

A. Acceptance for honor.

Where the drawee of a bill or draft has refused to accept it, and the bill or draft has been protested for non-acceptance, or where it has been protested for better security, the Law Merchant allows a stranger to the instrument to intervene and accept the instrument to save the credit of the drawer or of any one of the indorsers. Such an acceptance is called an acceptance for honor, or acceptance *supra protest.* This qualifies the general rule that only the drawee may accept. Indeed, it has been held that one stranger may accept for the drawer, another for the last indorser, another

for a prior indorser, etc., though there can not be series of acceptors for the honor of the same party. It follows from general rules that such an acceptance should be made before the paper is overdue.

Protest necessary. Before such an acceptance can be made, the bill or draft must be protested for non-acceptance, as, otherwise, the drawer might allege that he did not draw upon the person making the acceptance, and under such circumstances the acceptor *supra protest* might not be able to recover from the drawer the money he might pay. (280.)

How made. Such an acceptance must be in writing, and must indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. In England it must be on the bill itself, but the rule in the United States is that it may be on a separate piece of paper, attached or unattached to the instrument.

Form. An acceptance *supra protest* should be made in the presence of a notary and witnesses, the acceptor declaring at the time for whose honor he accepts, and subscribing his acceptance under the protest. This is not statutory, but customary. A long form is as follows: "Accepted under protest for the honor of ——— and will be paid for their account if regularly protested and refused when due." A shorter form: "Accepted *supra protest,* in honor of ———," while the more usual form is "Accepts s. p." and signed by the acceptor.

Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. (282.)

Effect of acceptance for honor. The holder of a bill or draft is not obliged to receive an acceptance for honor, and he may refuse it if he so desires. Even if he does receive the acceptance for the honor of one or more of the parties, he does not relinquish his right to protest the instrument against any of the other parties.

Rights and Liabilities of the Acceptor. The acceptor *supra protest* by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided, also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him. Demand of payment must be made of the acceptor for honor after due presentment for payment to the drawee and protest for non-payment. There must be a formal protest stating the presentment for payment, and the failure of the original drawee to pay, in order to charge the acceptor *supra protest.*

By such an acceptance the acceptor admits the genuineness of the drawer's signature, and he becomes liable to all holders and parties subsequent to the party for whose honor he has accepted. Of course, the acceptor for honor has his recourse against the party whom he

has honored and all parties prior to his acceptance for the amount of his bill and damages.

A is drawer. B drawee, C payee and indorser, D, E, F, indorsers. B refuses to accept and the bill is protested for non-acceptance. X accepts for the honor of D. He thus becomes liable to E and F and all holders subsequent to them, while he in turn has recourse against A and C. (283.)

Presentment for Payment to Acceptor for Honor. Presentment for payment to the acceptor for honor must be made not later than the day following its maturity, if it is to be presented in the place where the protest for non-payment was made. If presented in some other place than where it was protested, then the general rules as to notice of dishonor must be followed.

Maturity of "After sight" bill. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting the non-aceptance for honor. (285.) This settles definitely the question that heretofore has been unsettled.

Who may accept for honor. Any stranger may accept, upon consent of the holder. The drawee himself may accept for the honor of the drawer or of an indorser. Of course, any party already liable could not so accept, but the drawee owes no duty to any party to accept, unless under agreement to do so, and many, therefore, become an acceptor for honor.

B. Payment for honor.

When a bill of exchange or draft has been protested for non-payment, any person may intervene and pay the bill for the honor of any party liable thereon, and this without any request from him for whom he pays. Both foreign and inland bills may be thus paid. This is also true of promissory notes, but this rarely occurs.

Who may make payment for honor. Any person, whether he be a stranger or a party to the instrument may so pay it. The drawee, if he has refused to accept it for want of funds, may step in and pay it for honor, though, if he has once accepted it, he can not do so. It may sometimes happen that several offers of payment *supra protest* (payment for honor) may be made, and under such circumstances it is the duty of the holder to receive payment from the party whose offer is most favorable to the exoneration of other parties. In other words, the person whose payment will discharge the most parties must be given the preference.

In an instrument A is drawer, B the drawee, C the payee, D, E, F, G, indorsers. X may pay it for the honor of any one of them, or any one of the parties A, B, C, D, E, F, or G may pay it to save the honor of any other one of the parties. B can not accept and then pay for honor, but if he refuses to accept, he may pay for honor. (300, 303.)

When and how made. A bill of exchange must not be paid *supra protest* before its dis-

honor. Protest is necessary as a preliminary to a valid payment for honor. If paid for honor before it is protested the presumption is that it was paid for the honor of the drawee. In such a case the party who pays *supra protest* takes the place, and acquires the rights of an indorsee. The payment should be made in the presence of a notary, with a declaration for whose honor it is made, and it should be recorded in the protest itself or in a separate instrument. This declaration should declare the intention of the payer for honor to pay the bill for honor and for whose honor he pays. This notarial act of honor, as it is called, should be in writing and appended to the protest. (301, 302.)

Refusal to receive—effect of. Where the holder of a bill refuses to receive payment supra protest, he loses his right to hold any party who would have been discharged by such payment. (305.)

Effect of payment. Payment *supra protest* does not amount to a satisfaction or complete discharge of the instrument. The party who pays for honor to the holder is entitled to receive both the bill itself and the protest, and by such payment he takes to himself all the title of the party for whose honor he has paid. Under such circumstances he has a right of action against the party for whose honor he has paid, and all parties prior to him, but the payment for honor discharges all parties subsequent to him for whose honor it was paid, and this even

though the holder's title has been made through them. For instance, A is drawer, B drawee, C payee and indorser, D, E, F, G indorsers, and H is holder. X pays H for the honor of E. F and G are discharged from liability, while X takes E's title and has his right of action against E, D, C, and A. He also has a right of action against B, if he has accepted; otherwise not. He is even entitled to recover against B, if B had accepted the instrument for the accommodation of C or any other indorser; but if the accommodation acceptance was for A, the drawer's benefit, B would not be liable to X. (304, 306.)

PART XIV

Quasi Negotiable Instruments

The following instruments are not, in a strict sense of the word, Negotiable Instruments, but by force of custom and statute they have acquired certain qualities of negotiability and are, therefore, described as Quasi Negotiable Instruments.

The most frequent occasion for the transfer of Bills of Lading and Warehouse Receipts is where they are used as collateral upon which to secure advances. It was this custom which brought about the enactment of the statutes generally. In some States the statutes simply provide that they may be accepted by banks or individuals as collateral or pledges, up to a certain amount, and the party to whom they are transferred by indorsement shall be deemed the owner, so far as to give validity to any pledge, lien or transfer to any person.

In other States they have been declared negotiable. In all States where not expressly negotiable, they are treated as having an assignable value, which somewhat approaches negotiability.

BILLS OF LADING

Definition. A bill of lading is a written evidence of a contract for the carriage and delivery of goods. A more comprehensive and

correct one perhaps is that which defines it to be a written acknowledgment by a common carrier of the receipt of certain goods described therein and an agreement to transport them to their place of destination and there to be delivered to the consignee or parties therein designated. Bills of lading first came into use in connection with the transportation of goods by sea. This would now include the transportation of goods by any water route, as lakes, rivers, or canals, and, since the introduction of railroads, it has come to be applied to the instruments now in use by carriers of goods by land, although we know of these bills of lading more frequently as "freight bills," "express receipts," etc.

Form. Each should contain a description of the quantity, the condition in which the goods are received, the marks on the same, the names of the assignee and assignor, the places of shipment and discharge, and the price of the freight.

Second, If any limitation upon the liability of the common carrier has been agreed upon between the parties, it should be expressed in the bill of lading. All the parties are bound by the express terms of the bill of lading, which can not be varied by oral evidence. It should be noted that when the bill of lading acknowledges the receipt of goods "in good order and well conditioned," it has reference only to the external condition and is not a guaranty of good internal condition.

Where goods are carried by sea, the bill of lading is usually issued in sets of three, these three or more copies constituting but one contract. One of these three is retained by the common carrier, a second is given to the consignor, and a third may be sent to the consignee. The copy delivered to the consignor is regarded as the original copy, and if any questions arise concerning the contract they are to be interpreted according to the copy which is delivered to the consignor. Statutes have been enacted in many of the States with regard to the nature and operation of bills of lading and warehouse receipts. As a contract, a bill of lading is at law not even negotiable. These statutes, however, have generally made them so, and in most of the States a bill of lading is transferable usually by indorsement. Strictly speaking, only the consignee or the party to whom the goods are sold can transfer the bill of lading. Cases may happen, however, where the consignor owns the goods and sends them to the consignee, who is, in fact, only his agent; under such circumstances the transfer of the instrument must be made by the consignor.

Delivery. Delivery of the bill is essential to pass title to the goods as the indorsement.

Indorsement. Indorsement of the bill of lading may be made in blank, may be conditional or restricted, and, if so made, the indorsee becomes subject to the conditions or restrictions named.

Negotiable Instruments Compared. In a negotiable instrument the transferee gets an absolute title, while the indorsement of the bill of lading can give no better right to the goods than the indorser himself had. "As to the rule that a bona fide purchaser of a lost or stolen bill or note is not bound to look beyond the instrument, it has no application to the case of a lost or stolen bill of lading. The purchaser of a bill of lading who has reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding draft, is not a bona fide purchaser nor entitled to hold the merchandise carried by the bill against the true owner."

Stoppage in Transitu. This is the right which the consignor or vendor has to prevent his property passing into the hands of the consignee, who may have failed subsequently to the shipment of the goods by the consignor. This right exists in the vendor while the consignee retains the bill of lading, but if he were to transfer this bill of lading to a bona fide holder for value, this right is at an end. With the exception of the right of transfer and indorsement which is given by statutes generally, bills of lading do not resemble negotiable instruments in any wise. The bill of lading is merely a symbol of property and, generally speaking, its transfer will have the same effect as the transfer of property itself.

WAREHOUSE RECEIPTS

"During the last fifty years grain of all

kinds has been handled by merchants in bulk; and, for the more convenient transportation and transfer of the same, it is kept in bulk in public warehouses, called elevators, where all the grain received is stored in large bins according to quality, and irrespective to any prior ownership. Upon receiving the grain, the warehouseman or elevator company issues documents, in which the receipt of a certain quantity of grain of a certain quality and kind is acknowledged, and the promise is made to deliver it to the order of the depositor. These warehouse receipts are taken by the depositor or the exchanges of the cities as the representative of the grain itself; and when the grain, which they represent, is sold, the certificates are transferred by indorsement and delivery, or by delivery alone, if made deliverable to bearer or indorsed in blank. And the title to the grain will be as effectually transferred as if the grain itself had been delivered.

In consequence of the reliance placed by the mercantile world upon the absolute liability of the warehouseman on his receipt, a disposition has been manifested to apply the principles of negotiable instruments to these receipts and to give to the bona fide holder the same superior rights as such a holder of bills and notes has. And in many of the States the same end has been attained by the enactment of statutes. But independently of statute, it is very generally held that the warehouse receipt is not a negotiable instrument, the principal objection

being that the warehouse receipt calls for the delivery of goods, instead of the payment of money. The receipt is so far non-negotiable, that the warehouseman is not liable even to a bona fide holder if his agent has issued a receipt without getting possession of the goods. But, on the other hand, if the goods have been stored, and the warehouse receipt has been rightfully issued, the warehouseman can not deliver the goods to anyone but the lawful holder of the receipt; and the warehouseman is liable to the holder of the receipt, if the goods have been delivered to anyone else without the production and surrender of the receipt properly indorsed.

The warehouseman is not a guarantor of the title of property placed in his custody, although his receipts therefor are by statute transferable.

"When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to each depositor, fraudulently disposes of part of the wheat, the receipt-holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting." Tiedeman on Commercial Paper, page 499.

Mr. Tiedeman's statement as to wheat may well be applied to any kind of goods stored in any warehouse, either public or private. "A receipt given by a warehouseman for property placed in his possession for storage is not, in a

technical sense, like a bill of exchange, a negotiable instrument, but it merely stands in the place of the property it represents, and a delivery of a receipt has the same effect in transferring the title to the property as the delivery of the property."

The indorsement and delivery of the receipt of the warehouseman, in the course of trade, passes the title and right of possession of the property to the party to whom it is so indorsed and delivered. Such is the law and such is the understanding of the business community.

Form. No particular form is necessary. It is usually in the form of a receipt which describes the property, and which contains an agreement on the part of the warehouseman to re-deliver the property upon demand to the bailor or his order.

CERTIFICATES OF STOCK

Certificates of stock are classed as Quasi Negotiable Instruments. By statute they have been made transferable upon the books of the company. The usual form of a certificate of stock has a form of transfer or a power of attorney printed in blank upon the back of the instrument. The method of transferring the shares of stock is for the owner to sign the blank form, usually under seal, and deliver the certificate to the transferee. If this form has been signed in blank, in other words, if nothing has been filled in upon the blank form save the signature of the party who transfers, it

practically becomes a bearer instrument and may be transferred any number of times until it is filled up; when it is filled, however, it loses its character of transferability and must then be handed in to the office of the company and a new certificate issued in its place. The general rule is that the purchaser of the certificates of stock gets no better title than his vendor had. If stock which is payable to bearer or indorsed in blank is stolen or lost and unlawfully transferred to an innocent purchaser for value, the real owner may nevertheless recover it. This shows how they differ from bills and notes. The requirement that the transfer shall be made upon the books of the company is for the protection of the corporation, but this does not affect the right of the purchaser from the stockholder who may acquire as against everyone but the corporation, an absolute right of property in the stock.

Letters of Credit. "The letter of credit is a written assurance that the writer will pay a draft or drafts drawn on him to the limit of the amount stated in the letter by the person named. If the letter is addressed to a particular individual or individuals, it is called a special letter of credit, and no one but the person or persons named can advance money on the same, and then recover of the letter writer. But if it is not addressed to anyone in particular, it is called a general letter of credit, and anyone, by advancing money on the faith

of the letter, may recover back the same from the letter writer.

"The circular note differs only from a special letter of credit in that it authorizes any one of a list of correspondents in different places, which are given in the letter, to advance money on drafts drawn on the faith of the letter of credit. This form of letter of credit is very commonly used by tourists throughout the world, certain banking firms making a special business of furnishing travelers with these letters of credit or circular notes.

"Where the letter of credit authorizes the dawing of a bill of exchange on the letter writer, it amounts to an acceptance of such a bill, when it is drawn." Tiedeman on Commercial Paper, page 500.

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